(18,542.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 56.

THE PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM HUGHES AND BENJAMIN F. A. FLEMING, TRADING AS HUGHES & FLEMING.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 16, 1903.

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6285

1 In the Supreme Court of Pennsylvania.

WILLIAM HUGHES and BENJAMIN F. A. FLEMING, Trading as Hughes & Fleming, Plaintiffs,
v.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant.

No. 239, January Term, 1901.

Petition for Writ of Error.

To the Honorable J. Brewster McCollum, chief justice of the supreme court of Pennsylvania:

The petition of The Pennsylvania Railroad Company respectfully showeth:

That your petitioner brought suit into the supreme court of Pennsylvania for the eastern district, to January term, 1901, No. 239, by writ of certiorari to an appeal from the judgment of the court of common pleas, of Philadelphia county, No. 2, of September term, 1900, No. 39, in which suit in said supreme court your petitioner was appellant and defendant in the said court of common pleas, and William Hughes and Benjamin F. A. Fleming, trading as Hughes & Fleming were appellees in said supreme court and plaintiffs in said court of common pleas.

2 That the said suit in the said court of commom pleas was an action in trespass to recover $10,000 damages for injuries to a horse shipped from Albany, N. Y. to Cynwyd, Pa., injured Aug. 12, 1900, at latter place. The defendant pleaded not guilty. At trial, defendant admitted liability but relied upon the bill of lading and live stock contract, under which shipment was made and rate based, and which also contained an agreed valuation of $100. The defendant presented the following points to the learned trial judge for charge:

1. "That it was lawful in the State of New York for the carrier to limit its liability by a special contract for an injury resulting from its negligence; that said contract having been for a through consignment from Albany to Cynwyd, a place within this State, said contract must be considered in its entirety and is incapable of divisibility; that said contract having stipulated for an agreed valuation of the stock shipped, the parties must be governed by its terms throughout the entire route, as said contract must be interpreted and enforced here by the law of the place where it was made, and within which State it was partly performed; and that, consequently, the plaintiffs were not entitled to recover in excess of the valuation agreed upon by the parties at the time of shipment."

2. "That the plaintiffs are not entitled to recover in excess of $100."

Both points were declined. A verdict was rendered for plaintiffs for $9900.

That the said court of common pleas rendered judgment against your petitioner on the 10th day of June, 1901, in the sum of $9900, with costs.

That afterwards, to wit, on the 24th day of June, 1901, an appeal from said judgment was taken to the supreme court of Pennsylvania and said judgment of the court of common pleas was asked to be reversed, *inter alia*,

"The learned court below erred in entering judgment in conflict with the act of Congress of February 4th, 1887, entitled "An act to regulate commerce." Section 1 of said act clearly provides that where the transportation is from one State to another, under a through bill of lading, that its provisions shall be carried out unless it be in conflict with a statute of the State in which it may be performed or in conflict with the policy of the United States as laid down in the Federal courts, and that, as the contract was valid in the place where made, and as there is no statute in Pennsylvania prohibitory of an agreed valuation to establish a rate, and as it is consistent with the policy of the United States as declared by the Federal courts, the judgment should have been for the valuation mentioned in the contract."

That on the 21st day of April, 1902, the supreme court of Pennsylvania, sitting at Philadelphia, overruled said assignment
4 of error and ordered said judgment to be affirmed, and afterwards on the said 21st day of April, 1902, the said judgment was duly entered and recorded in the eastern district of Pennsylvania aforesaid.

That by virtue of said affirmance it has been declared to be the law of Pennsylvania that a contract for inter-state commerce transportation, valid under the laws of the United States, is invalid and non-enforceable.

That the said judgment of the said supreme court is a judgment of the highest court of record of the Commonwealth of Pennsylvania.

That the judgment of the said court is final.

That the defence sought to be availed of by your petitioner defendant and appellant aforesaid, was that inasmuch as the contract in controversy was for an interstate transportation, it should have been interpreted in accordance with the Constitution of the United States, article I, section 8, empowering Congress "to regulate commerce with foreign nations and among the several States and with the Indian tribes," the act of Congress, approved February 4, 1887, entitled "An act to regulate commerce," and the policy laid down by the Federal courts, all of which appears of record.

That the decision and judgment of the supreme court of Pennsylvania aforesaid was against said Constitution of the United States, act of Congress and policy of the Federal courts.

5 Your petitioner, therefore, prays for the allowance of a writ of error to the supreme court of Pennsylvania in order that the said judgment of the supreme court of Pennsylvania may be re-

examined and reversed or affirmed in the Supreme Court of the United States.

And it will ever pray.

THE PENNSYLVANIA RAILROAD COMPANY,
By CHAS. E. PUGH, *2nd Vice-President.*

Attest: A. J. COUNTY, [SEAL.]
Ass't Secretary.

Charles E. Pugh, being duly sworn according to law, deposes and says that he is the second vice-president of The Pennsylvania Railroad Company, the petitioner, and, on its behalf, says that the facts in the above petition stated are true to the best of his knowledge and belief.

CHAS. E. PUGH.

Sworn to and subscribed before me this fifth day of May, 1902.
J. BREWSTER McCOLLUM,
Chief Justice of Pennsylvania.

6 Endorsement: January term 1901. S. C. E. D. Appeal of the P. R. R. Co. from the judgment made in the case in which William Hughes and Benj. F. A. Fleming, trading as Hughes & Fleming, were plaintiffs and the above named appellant was defendant. Petition for writ of error. And now, to wit, May 6th, 1902 citation awarded and writ of error allowed by me. J. Brewster McCollum, chief justice of Pennsylvania. Filed May 14th, 1902. George Brodbeck, Jr., pro clerk U. S. C. C. Sellers & Rhoads John G. Johnson, for appellant.

7 *Writ of Error.*

UNITED STATES OF AMERICA:

The President of the United States to the honorable the supreme court of the State of Pennsylvania for the eastern district, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Pennsylvania for the eastern district before you, or some of you, being the highest court of law and equity of the said State in which a decision could be had, which plea was the appeal of the Pennsylvania Railroad Company of January term, 1901, No. 239, to the supreme court from the judgment of the court of common pleas, No. 2, of Philadelphia county, in a certain suit between William Hughes and Benjamin F. A. Fleming, trading as Hughes & Fleming, plaintiffs, and The Pennsylvania Railroad Company, defendant, wherein was drawn in question the validity of the Constitution and statute law of the United States, and a defence claimed and exercised thereunder and the decision was against their validity, a

manifest error hath happened to the great damage of the said Pennsylvania Railroad Company, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given,
8 that then, under your seal distinctly and openly you send the records and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 14th day of May, in the year of our Lord, one thousand nine hundred and two, and the one hundred and twenty-sixth year of the Independence of the United State.

[Seal U. S. Circuit Court, E. D. Pennsylvania.]

GEORGE BRODBECK, Jr.,
Pro Clerk U. S. Circuit Court, East'n District of Pennsylvania.

9 [Endorsed:] 239. Jan. term, 1901—Supreme court Pa., E. dist. Appeal of the P. R. R. Co. from the judgment made in the case in which William Hughes and Benj. F. A. Fleming, trading as Hughes & Fleming were plaintiffs and the above named appellant was defendant. Writ of error allowed by me this 5th day of May, 1902. J. Brewster McCollum, chief justice of Pennsylvania. Sellers & Rhoads, John G. Johnson, for appellant.

10 *Citation.*

The United States of America to William Hughes and Benjamin F. A. Fleming, trading as Hughes & Fleming, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, next, pursuant to a writ of error filed in the prothonotary's office of the supreme court of Pennsylvania for the eastern district wherein The Pennsylvania Railroad Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable J. Brewster McCollum, chief justice of the supreme court of Pennsylvania, this fifth day of May, in the year of our Lord one thousand nine hundred and two.

J. BREWSTER McCOLLUM,
Chief Justice of Pennsylvania

Affidavit of Service of Citation.

Thomas Bluett, being duly sworn, deposes and says that he served the within citation upon the defendants in error William Hughes and Benjamin F. A. Fleming, trading as Hughes & Fleming,
11 by reading the same to their attorney, A. S. L. Shields, Esq., and handing him a true copy thereof on the fifteenth day of May, 1902.

THOMAS BLUETT.

Sworn to and subscribed before me this 16th day of May, 1902.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE,
Prothonotary Supreme Court of Pennsylvania, East. Dist.

12 [Endorsed:] 239. Jan. term, 1901. Supreme court of Pa. E. dist. Appeal of the P. R. R. Co. from the judgment made in the case in which William Hughes and Benj. F. A. Fleming, trading as Hughes & Fleming were plaintiffs and the above named appellant was defendant. Citation and affidavit of service of citation. Filed May 16 1902 In supreme court of Penna. Sellers & Rhoads, John G. Johnson, for appellant.

13 In the Supreme Court of Pennsylvania, January Term, 1901.

WILLIAM HUGHES and BENJAMIN F. A. FLEMING, Trading as Hughes & Fleming, Plaintiffs, *v.* THE PENNSYLVANIA RAILROAD COMPANY, Defendant.	No. 239.

Bond and Justifications of Sureties.

Know all men by these presents that we, the Pennsylvania Railroad Company and Fidelity & Deposit Co. of Md. are held and firmly bound unto William Hughes and Benjamin F. A. Fleming, trading as Hughes & Fleming, in the full and just sum of twenty thousand dollars ($20,000) to be paid to the said Hughes & Fleming, their certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we do bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the seventh day of May, one thousand nine hundred and two.

Whereas lately at a court of common pleas No. 2 in and for the county of Philadelphia, judgment was entered against the Pennsylvania Railroad Company at the suit of William Hughes
14 and Benjamin F. A. Fleming, trading as Hughes and Fleming, of September term, 1900, No. 39, which judgment was

afterwards affirmed by the supreme court of the State of Pennsylvania in a certain plea and suit in said court, of January term, 1901, No. 239. And the said Pennsylvania Railroad Company having obtained a writ of error to the Supreme Court of the United States to reverse the said judgment rendered in the last above entitled action, and having filed a copy thereof in the office of the prothonotary of said court, and a citation directed to the said William Hughes and Benjamin F. A. Fleming, trading as Hughes & Fleming, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, the second Monday of October next.

Now the condition of the above obligation is such that if the said Pennsylvania Railroad Company shall prosecute its said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

THE PENNSYLVANIA RAILROAD COMPANY,
By CHAS. E. PUGH, *Vice President.*
Attest: A. J. COUNTY, *Ass't Secretary.* [SEAL.]
FIDELITY & DEPOSIT CO. OF MD.
THEO. W. STONE, *Legal Director.*
Attest: HERMAN HOOPES, [SEAL.]
Resident Manager.

Sealed and delivered in the presence of
CHAS. S. GREENE.

Approved by
J. BREWSTER McCOLLUM,
Chief Justice of Pennsylvania.

15 STATE OF PENNSYLVANIA, } ss:
Eastern District, }

Before me, prothonotary of the supreme court of Pennsylvania, eastern district, personally came the Pennsylvania Railroad Company, by its 2nd vice president, Chas. E. Pugh, and its assistant secretary, A. J. County, the obligor in the foregoing bond, who being severally sworn according to law, did depose and say each for himself respectively, as follows: viz: that the Pennsylvania Railroad Company is the owner of property in the State of Pennsylvania, worth over and above all liabilities twenty thousand dollars.

CHAS. E. PUGH.
A. J. COUNTY.

Sworn to and subscribed before me this seventh day of May, 1902.
CHAS. S. GREENE,
Prothonotary.
[SEAL.]

Endorsement: No. 239 Jan. term 1901. Supreme court of Pa. E. dist. Appeal of the P. R. R. Co. from the judgment made in the case in which William Hughes and Benj. F. A. Fleming, trading as Hughes & Fleming were plaintiffs and the above named appellant was defendant. Bond. Sellers & Rhoads John G. Johnson for appellant.

16 Supreme Court of Pennsylvania, Eastern District.

Among the records and proceedings of the supreme court of Pennsylvania, in and for the eastern district, *inter alia*, the following is thus contained:

Appearance Docket.

Docket Entries.

No. 239, January Term, 1901.

A. S. L. Shields

WILLIAM HUGHES and BENJAMIN F. A. FLEMING, Trading as Hughes & Fleming, Plaintiffs,
v.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant. } 239.

David W. Sellers
John G. Johnson.
Sellers & Rhoads
Order filed 4-24-1902

Appeal from the court of common pleas No. 2 of the county of Philadelphia.
Filed June 24, 1901.
Eo die.—Certiorari exit. Ret'ble the first Monday of January 1902.
November 18, 1901.—Assignments of error filed.
November 22, 1901.—Record returned and filed.
January 20, 1902.—Argued.
17 April 21, 1902.—Judgment is affirmed.
Opinion by Potter, J.
Mitchell, J. and Brown, J. dissent.
Appeal of defendant from the judgment.
C. P. 39 Sept. term, 1900
Petition for a writ of error from the Supreme Court of the United States.

Writ of error allowed by me this 5th day of May, 1902.

J. BREWSTER McCOLLUM,
Chief Justice of Pennsylvania.

And now to wit, May 6th 1902 *citation awarded* and *writ of error allowed* by me

J. BREWSTER McCOLLUM,
Chief Justice of Pennsylvania.

May 7, 1902.—Bond in $20,000 filed.
May 14, 1902.—Writ of error from the Supreme Court of the United States brought into office.
May 16, 1902.—Citation and affidavit of service of citation brought into office
May 17, 1902.—Assignments of error (Supreme Court of the United States) brought into office.

18 *Appeal and Affidavit.*

In the Supreme Court of Pennsylvania for the Eastern District.

Court of Common Pleas No. 2 of the County of Philadelphia, September Term, 1900.

WILLIAM HUGHES and BENJAMIN F. A. FLEMING, Trading as Hughes and Fleming, Plaintiffs,
v.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant. } No. 39.

Enter appeal on behalf of defendant from judgment of the court of common pleas No. 2 of the county of Philadelphia.

DAVID W. SELLERS,
For Appellant.

To Charles S. Greene, prothonotary supreme court, eastern district.

19 COUNTY OF PHILADELPHIA, *ss:*

Edwin Jaquett Sellers being duly sworn saith that said appeal is not taken for the purpose of delay, but because appellant believes it has suffered injustice by the judgment from which it appeals. Deponent makes this affidavit as the attorney of the said defendant appellant.

(Signed) EDWIN JAQUETT SELLERS.

Sworn to and subscribed, this 22nd day of June, A. D. 1901.

CHAS. S. GREENE,
Prothonotary.

I agree that the prothonotary of the supreme court may issue a writ of certiorari in the above without a recognizance.

(Signed) A. S. L. SHIELDS,
Pl'ff's Att'y.

Endorsement: No. 239 January term, 1901. Supreme court of Pennsylvania, eastern district. William Hughes *et al.*, trading etc., *v.* Pennsylvania Railroad Co., appellant. Appeal and affidavit Filed Jun- 24, 1901. In supreme court. David W. Sellers, attorney for appellant.

20 *Præcipe for Certiorari.*

In the Supreme Court of Pennsylvania for the Eastern District.

PENNSYLVANIA RAILROAD COMPANY, Appellant.

Certiorari to the court of common pleas No. 2 of the county of Philadelphia, of September term, 1900. No. 39.

Issue certiorari to the court of common pleas No. 2 of the county of Philadelphia, to bring up record and proceedings in a certain action in said court, No. 2 September term, 1900 wherein Hughes & Fleming are plaintiffs, and Pennsylvania Railroad Company defendant. Returnable to next term, *sec. reg.*

(Signed) DAVID W. SELLERS,
Attorney for Appellant.

To Charles S. Greene, proth'y, sup. court, E. D.

Endorsement: No. 239 January term 1901. Supreme court of Pennsylvania, eastern district. William Hughes *et al.*, trading etc., *v.* Pennsylvania Railroad Co. appellants. Præcipe for certiorari. Filed Jun- 24, 1901. In supreme court. David W. Sellers, attorney for appellant.

21 Record of the court of common pleas No. 2 of Philadelphia county.

Exemplification.

PHILADELPHIA COUNTY, } *sct:*
State of Pennsylvania, }

Among the records and proceedings of the court of common pleas, No. 2 for the county of Philadelphia, State of Pennsylvania, the following may be found as matter of file and of record, at No. 39 September term, 1900, to wit:

Docket Entries.

September Term, 1900.

Shields.

WILLIAM HUGHES and BENJAMIN F. FLEMING, Trading as Hughes and Fleming,
v.
PENNSYLVANIA RAILROAD Co. } 39.

D. W. Sellers
Oct. 5, 1900.

Sums trespass Exit Sept. 21, 1900.
Ret. 1 Mon. Oct. 1900.
Served.
May 7, 1900.—Jury called.
May 8, 1901.—V. for plaintiff $9900.
May 13, 1900.—Rule for new trial.
Eo die reason filed.
Oct. 5, 1900.—Statement and rule to plead filed.
Oct. 24, 1900.—Plea filed
May 10, 1901.—Pl't'ffs' bill of $57.87 filed
May 29, 1901.—Bill of exceptions filed.
June 4, 1901.—Rule discharged
June 8, 1901.—Stenographic notes of testimony filed.
June 10, 1901.—Jury fee paid.
Eo die judgment.
June 24, 1901.—Certiorari from S. C. (of Jan'y T. 1901, No. 239) bro't into office

22 Certified from the record, this 8th day of July, A. D. 1901.
(Signed) [SEAL.] C. G. McCULLOUGH,
Pro. Proth'y.

Præcipe for Summons Trespass.

WILLIAM HUGHES and BENJAMIN F. A. Fleming, Trading as Hughes & Fleming,
v.
PENNSYLVANIA RAILROAD COMPANY. } No. —. C. P. No. —, September Term, 1900.

Issue summons trespass as above. Returnable first Monday of October, 1900.
(Signed) A. S. L. SHIELDS,
Attorney for Plaintiffs.

To proth'y C. P.

Endorsement: No. 39 Sept. term, 1900. C. P. No. 2. Hughes *et al.*, tr'd'g &c. *v.* Pennsylvania Railroad Company. Præcipe for summons trespass Filed Sep. 20, 1900. Rains, pro. proth'y. A. S. L. Shields, att'y for pl't'fs.

23 *Summons Trespass.*

COUNTY OF PHILADELPHIA, *ss:*

[SEAL.] The Commonwealth of Pennsylvania to the sheriff of the county of Philadelphia, Greeting:

We command you that you summon Pennsylvania Railroad Company, late of your county, so that it be and appear before our judges, at Philadelphia, at our court of common pleas No. 2 of the county of Philadelphia, to be holden at Philadelphia, in and for said county, on the first Monday of October next, there to answer William Hughes and Benjamin F. A. Fleming, trading as Hughes & Fleming of a plea of trespass. And to have you then and there this writ.

Witness the Honorable S. W. Pennypacker, president of our said court, at Philadelphia, the 20th day of Sept. in the year of our Lord, one thousand nine hundred.

(Signed) SOLOMON RAINS,
P. Prothonotary.

Served the Pennsylvania Railroad Company by giving October 1st, 1900 a true and attested copy of the within writ to R. W. Smith, treasurer of said company, and making known to him the contents thereof.

So answers

(Signed) PETER SAYBOLT,
Deputy Sheriff.

" WENCEL HARTMAN, *Sheriff.*

24 Endorsement: No. 39 Sept. term, 1900. Court of common pleas, No. 2 Hughes & Fleming *v.* Pennsylvania Railroad Company. Summons trespass. Shields.

Statement of Plaintiffs' Claim.

WILLIAM HUGHES and BENJAMIN F. A. FLEMING, Trading as Hughes & Fleming,
v.
THE PENNSYLVANIA RAILROAD COMPANY.
No. 39. C. P. No. 2, September Term, 1900.

Statement of plaintiffs' claim.

COUNTY OF PHILADELPHIA, *ss:*

William Hughes and Benjamin F. A. Fleming, trading as Hughes and Fleming, the plaintiffs, by A. S. L. Shields, Esq., their attorney, claim of the defendant the sum of ten thousand dollars damages

for injuries to the property of the plaintiffs caused by the negligence of the defendant under the following averments of facts and circumstances:

That heretofore, to wit, on the 12th day of August, 1900, the defendant was a common carrier for hire and as such common
25 carrier had in his custody and possession a certain bay gelding, known as "Montauk," the property of the plaintiffs, of great value, to wit, of the value of ten thousand dollars, in a certain car of the said defendant, to be safely and securely carried by it as such common carrier for hire over and along the railroad of the defendant in the State of Pennsylvania to Cynwyd, Montgomery county, in said State.

And it became and was the duty of said defendant to use due and proper care and caution to safely and securely carry the said gelding over and along the line of its said railroad as aforesaid.

Yet the defendant, not regarding its duty in this behalf, did not use due and proper care and caution to safely and securely carry the said gelding as aforesaid; but, on the contrary, on the day and year aforesaid, the defendant side-tracked the car in which the said bay gelding was being carried by it as such common carrier for hire, at a siding on the main line of its said railroad at Fifty-second street in the county of Philadelphia in the State of Pennsylvania, and while the said car in which was the said bay gelding was still upon the said siding, to wit, on the day and year aforesaid, at the county aforesaid, the defendant, by its servants and agents, so carelessly, recklessly and negligently caused two certain other cars loaded with heavy metal to be run and driven upon and against the said
26 first mentioned car of the defendant on the said siding of the defendant, in which the said gelding was being carried by the defendant as such common carrier for hire, and the collision was so forcible and violent, that thereby the said bay gelding of the plaintiffs in the said car was knocked about in the said car against the sides thereof, and severely bruised and contused, his muscles strained, shocked and injured his tail broken, and his whole system so badly shocked and injured that thereby he became of no value and wholly ruined.

And the plaintiffs were necessarily compelled to incur large expenses in the endeavor to heal and cure their said gelding "Montauk" of his said injuries.

Wherefore the plaintiffs say they are injured and have sustained damages to a large amount, to wit, to the amount of ten thousand dollars.

Hence this suit.

(Signed) A. S. L. SHIELDS,
Attorney for Plaintiffs.

To proth'y C. P.

COUNTY OF PHILADELPHIA, *ss:*

Benjamin F. A. Fleming one of the above mentioned plaintiffs, being duly sworn, says that the facts set forth in the foregoing statement of claim are true to the best of his knowledge and belief.

[SEAL.] (Signed) BENJ. F. A. FLEMING.

27 Sworn and subscribed before me this 5th day of October, 1900.

(Sig.) JOHN B. DEVINE,
Notary Public.

Endorsement: No. 39 Sept. term, 1900. C. P. No. 2. William Hughes and Benjamin F. A. Fleming, tr'd'g &c., *v.* Pennsylvania Railroad Company. Statement of plaintiffs' claim. Enter rule on the defendant to plead in 15 days, or judgment *sec. reg.* To pro. C. P. Filed Oct. 5, 1900. Pennypacker, pro. proth'y. A. S. L. Sheilds att'y for pl'ffs.

Appearance.

David W. Sellers, Edwin Jaquett Sellers, attorneys-at-law.

PHILADELPHIA, *Oct.* 10, 1900.

HUGHES & FLEMING *v.* PENNA. R. R. } 39. 2 Sept., 1900.

The proth'y will enter my appearance for the defendant.

(Signed) DAVID W. SELLERS.

Endorsement: No. 39, Sep. term, 1900. C. P. No. 2 Hughes & Fleming *v.* R. R. Appearance Filed Oct. 8, 1900. Pennypacker pro. proth'y David W. Sellers

28 *Plea.*

HUGHES & FLEMING *v.* RAILROAD CO. } No. 39. C. P. No. 2, Sept. Term, 1900.

Defendant pleads—not guilty.

(Signed) DAVID W. SELLERS,
Att'y for Def'ts.

To prothonotary C. P.

Endorsement: No. 39 Sept. term, 1900. C. P. No. 2. Hughes & Fleming *v.* R. R. Plea Filed Oct. 24, 1900. J. Briggs, pro. proth'y. David W. Sellers.

Bill of Costs.

WM. HUGHES and BENJ. F. A. FLEMING, Tr'd'y, &c., v. PENNSYLVANIA R. R. Co. } No. 39. Common Pleas No. 2, Sept. Term, 1900.

Plaintiffs' bill of cost.

The following witnesses attended for the plaintiffs on the days as follows:

29	George W. Cook	2 days, viz. May 7 & 8, 1901					.....	$3.00
	Wesley Wright	2	"	"	"	"	"	.....	3.00
W. H. H. Achuff		2	"	"	"	"	"	.....	3.00
Joshua Evans		2	"	"	"	"	"	.....	3.00
Dr. Chas. Bridge,		2	"	"	"	"	"	.....	3.00
Wm. McFarland		1	"	"	"	"	"	.....	1.50
Thomas Young		1	"	"	"	"	"	.....	1.50
David Morgan,		2	"	"	"	"	"	.....	3.00
Mileage from Ardmore, Pa., 9 miles at 6 cts.								.....	.54
Dr. Rob't J. Fox 2 days, viz. May 7 & 8, 1901								.....	3.00
Mileage from Bryn Mawr, Pa. 10 miles, 6 cts.								.....	.60
Thomas Grady, 2 days, viz. May 7 & 8, 1901								.....	3.00
Mileage from Narberth, Pa., 6 miles, 6 cts.								.....	.36
Frank Jackson, 2 days, viz. May 7 & 8, 1901								.....	3.00
Mileage from Narberth, Pa., 6 miles, 6 cts.								.....	.36
Charles B. Myers, 2 days, viz. May 7 & 8, 1901								.....	3.00
Mileage from Narberth, Pa. 6 miles, 6 cts.								.....	.36
George Garth, 2 days, viz. May 7 & 8, 1901								.....	3.00
Mileage from Penna. line, 30 miles 6 cts.								.....	1.80
Harry Wilkie, 2 days, viz. May 7 & 8, 1901								.....	3.00
Mileage from Penna. line, 200 miles. at 6 cts.								.....	12.00
Subpœna								.....	.25
Service of same								.....	2.10
Affidavit to this bill								.....	.50
									$57.87

30 COUNTY OF PHILADELPHIA, *ss:*

Benj. F. A. Fleming being duly sworn says that the above bill of costs is true and correct, that the above named persons were actually present in the court of common pleas No. 2, room D, as witnesses in the above cases for the plaintiffs on the days and times above specified, and that they are all, in his opinion, material witnesses.

(Signed) BENJ. F. A. FLEMING.

Sworn and subscribed before me this 9th day of May, A. D. 1901.

[SEAL.] (Sig.) JOHN B. DEVINE,
Notary Public.

Commission expires Jan. 2, 1905.

Endorsement: No. 39 Sept. term, 1900. C. C. P. No. 2. Hughes & Fleming *v.* Railroad Co. Bill of costs of plaintiffs. Filed May 10, 1901. J. Briggs, pro. proth'y. A. S. L. Shields, attorney for plaintiffs.

31 In the Court of Common Pleas No. 2 for the City and County of Philadelphia, of September Term, 1900.

WILLIAM HUGHES and BENJAMIN F. A. FLEMING, Trading as Hughes & Fleming,
v.
PENNSYLVANIA RAILROAD COMPANY. } No. 39.

Be it remembered, that in the said term of September, 1900, came the said plaintiff- into the said court, and impleaded the said defendant in a certain plea of trespass &c., in which the said plaintiff- declared (*prout* statement) and the said defendant pleaded (*prout* plea). And thereupon the issue was joined between them.

And afterwards, to wit, at a session of said court, held at the county aforesaid before the Honorable Mayer Sulzberger, judge of the said court, on the 7 day of May, 1901, the said issue between the said parties came to be tried by a jury of the said county for that purpose duly impanelled (*prout* list of jurors), at which day came as well the said plaintiff- as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impanelled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue;
32 and upon the trial, the witnesses being duly sworn or affirmed, the following testimony was produced:—

WILLIAM HUGHES and BENJAMIN F. A. Fleming, Trading as Hughes & Fleming,
v.
THE PENNSYLVANIA RAILROAD CO. } No. 39. C. P. No. 2, S., 1900.

PHILADELPHIA, *May 7th and 8th*, 1901.

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34 WILLIAM HUGHES and BENJAMIN F. A. Fleming, Trading as Hughes & Fleming, *v.* THE PENNSYLVANIA RAILROAD CO. } No. 32. C. P. No. 2, S., 1900.

Before Hon. Mayer Sulzberger and a jury.

Present: A. S. L. Shields, Esq., for the plaintiff. E. J. Sellers, Esq., for the defendant.

PHILADELPHIA, *May 7th*, 1901.

HARRY WILKIE, sworn.

By Mr. SHIELDS:

Q. What is your business.
A. Taking care of race horses.
Q. How long have you been in that business.
A. Well since I have been able to run around and take care of myself.
Q. Since you were a boy?
A. Yes, sir.
Q. How old are you now?
A. Twenty-six.

Q. Did you know the race horse Montauk?
A. Yes, sir.
35 Q. How long did you know him?
A. Well, from last spring.
Q. How long had he been in your charge, if at all?
A. From the time Mr. Fleming and Mr. Hughes owned him.
Q. We do not know that. These gentlemen do not know how long they have owned him, as that has not been disclosed to them. About how long?
A. Well, May or June, latter part of May, or June.
Q. Of 1900?
A. 1900.
Q. During that time that you had charge of him for the plaintiffs did you see this horse perform on the track?
A. Yes, sir.
Q. How often?
A. A few times.
Q. Did he have a mark, a record?
A. He had a mark at Point Breeze.
Q. What was that?
A. Sixteen and a quarter.
Q. Two sixteen and a quarter?
A. Yes, sir.
Q. That is the only mark that he received, is it?
A. He had one before that, I believe, but I didn't pay any attention to it; all I know was that I seen him get the mark at the Breeze of sixteen and a quarter.
Q. By a "mark" you mean a record made on a race track?
A. Yes, sir.
36 Q. You saw him trot, did you, two sixteen and a quarter?
A. Saw him pace.
Q. Saw him pace two sixteen and a quarter?
A. Yes, sir.
Q. How old a horse was he?
A. A four year old, I believe.
Q. A four year old?
A. I believe.
Q. Where did you start from on your trip to Cynwyd, in this State?
A. Island Park, Albany.
Q. Island Park, Albany, New York?
A. Yes, sir.
Q. And you went over the West Shore road?
A. I believe we did.
Q. And through New York?
A. Yes, sir.
Q. And then over the Pennsylvania railroad?
A. Yes, sir.
Q. You got on to the Pennsylvania railroad?
A. Yes, sir.

Q. And after you got on to the Pennsylvania railroad, you ran over the Pennsylvania railroad tracks to where?

A. Fifty-second street.

Q. That is the Pennsylvania railroad yard at Fifty-second street?

A. Yes, sir.

37 Q. While you were there what happened to you?

The COURT: This was on the road to some destination?

Mr. SHIELDS: Cynwyd.

Q. How would you reach Cynwyd?

A. We had to go right through Fifty-second street, if we didn't stop, to go to Cynwyd.

Q. You would have to go past Fifty-second street; that is on the Schuylkill division of the Pennsylvania railroad, is it not?

A. Yes, sir.

Q. This was an intermediate station between where you started from in New York, and Cynwyd where you were to go, was it not, I mean Fifty-second street?

A. Yes, sir.

Q. And on the road of the Pennsylvania railroad?

A. And on the Pennsylvania railroad.

Q. And on the road from Albany to Cynwyd, is it not?

A. Yes, sir.

Q. While you were there on your road what happened?

The COURT: When was this?

Mr. SHIELDS: The date of the accident was August 12th 1900. There is no dispute about that.

By Mr. SHIELDS:

Q. August 12th, 1900, was the day that you landed and the day of the accident?

A. The day we landed and the day of the accident.

Q. And while you were thus on your road what happened

38 to the car in which you and the horse were riding?

A. After we got to Fifty-second street?

Q. Yes.

A. Throwed the horse a complete somersault.

Q. What threw him? You did not turn him over. What turned him over?

A. These two cars loaded with iron, loaded very heavy.

Q. What two cars?

A. There was two cars——

Q. You were standing on the track, were you not?

A. I was in the car.

Q. With the horse?

A. With the horse.

Q. And that car was standing on the track; that is correct, is it not?

A. Yes, sir.

By the COURT:

Q. Let us find out about that car. Was the car alone or forming part of a train, or how?

A. Our car, the car that I was in, was standing by itself near no car——

By Mr. SHIELDS:

Q. Near no car, and waiting?

A. Near no car; that is, there was two or three spaces of another car between us and in connection with another one——

Q. Waiting the drilling?

A. Yes, sir.

39 Q. So that it would be made up in a train?

A. Yes, sir.

Q. While it was in that condition what happened?

A. These two cars loaded with iron, and loaded very heavy, came down and ran into us.

By the COURT:

Q. How did they come down?

A. They came on the same track we were, and hit the car that I was in and the horse was in.

Q. Were those two cars alone?

A. Yes, sir.

Q. Without a locomotive?

A. Yes, or a man.

Q. How?

A. Or a man.

Q. Did you see them start?

A. No, I seen them when they were approaching on me.

By Mr. SHIELDS:

Q. And felt them, did you not?

A. And I felt the rumbling.

Q. When they collided what happened?

A. It throwed the horse a complete somersault and I got out of the way of it.

Q. You got out of the way of it?

A. To protect myself.

Q. What was the result to the horse?

A. He was injured.

40 Q. To what degree, how bad was he hurt?

A. That I could not say, he was hurt pretty badly.

Q. What did you see, was he able to get up?

A. Well, he got up with a struggle, and when he got up he stood right in one corner of the car and never moved until we ran him to Cynwyd.

Q. Until you got to Cynwyd?

A. Yes, until they ran it out there, and then he commenced to move around the car a little, but very little.

Q. Very little
A. Yes, sir.
Q. After you got him out of the car what was done with him?
A. Dr. Cullen took him off the car.
Q. Dr. who?
A. Dr. Cullen took him off the car, and his man.
Q. Who?
A. Dr. Cullen took him off the car and his man, or employé, it was, at the stock yards, and I had nothing more to do with him when they came after him.
Q. You had had considerable experience with horses prior to this?
A. Yes, sir.
Q. When you shipped him to Albany, or rather when that car was struck containing the horse in question, was the horse sound?
A. Yes, sir.
Q. How was he afterwards?
A. He was unsound.
41 Q. Is he worth anything, or is he ruined?
A. He is ruined.
Q. What?
A. He is ruined.
Q. And worth nothing?
A. And worth nothing.

Cross-examined.

By Mr. SELLERS:

Q. Is that your signature?

(Paper shown witness.)

A. Yes, sir.
Q. And you identify that as the shipping receipt which was given when the horse was shipped?

Mr. SHIELDS: We will admit that: we will admit that it is his signature, to save time.

Q. I say you also admit that is the shipping contract which when the horse was shipped, was given you in Albany?
A. That is the paper I had in my possession.
Q. What has become of this horse since the accident?
A. Since the accident?
Q. Yes.
A. Where is it to-day? I have been away.
Q. You have been away since the accident?
A. Yes, sir.
Q. You have seen the horse since the accident. Tell us what became of the horse since the accident.

42 A. I have seen him since the accident but I have not——
Q. He was not stuffed in a museum, was he? I mean cannot you tell the jury——

The COURT: Tell us when you saw him last.

Q. Just tell when you saw him.
A. I saw him at Belmont.
Q. How long ago?
A. When I left there in February.
Q. Last February you saw him at Belmont, that is February 1901, you saw him at Belmont, that is the Gentlemen's driving park out here at Belmont?
A. Yes, sir.
Q. What was he doing out there?
A. He was turned out.
Q. At pasture?
A. No, he was turned out.
Q. Was he in charge of a trainer?

By the COURT:

Q. What is the meaning of "turned out"?
A. For exercise.

By Mr. SELLERS:

Q. Turned out for exercise; what was the name of the trainer?
A. Mr. Grady, I believe, had him in charge then.
Q. What was he doing with him, how was he training him, do you know?
A. I don't know.

43 Mr. SHIELDS: He does not say he was "training" him.

By the COURT:

Q. How was he exercising?
A. Walking around, running around.

By Mr. SELLERS:

Q. Walking around and running around, was it on a track, exercising him on a track?
A. No, sir.
Q. Where was he exercising him?
A. In a paddock.
Q. Was not he ever put on a track at all?
A. Not after the accident.
Q. I do not mean to run a race.
A. Not after the accident.
Q. I do not mean since the accident has he been put on a track or the purpose of running a race, but has not he been exercised on track since the accident?
A. No, sir.

Q. And how fast can he go now, do you imagine; since the accident can he go faster than a walk?

A. Just a little.

Q. In your opinion, just a little faster than a walk?

A. Not much better; no good for racing in no way, shape or form.

Q. Not good for racing, but now just for ordinary driving, and so forth, is he not fit for that purpose?

A. No, sir.

44 Q. Do you think or not that this horse cannot go outside of a walk?

A. He can go outside of a walk.

Q. How much faster than a walk? Give it to us now—how many miles an hour?

A. I can't say.

Q. You do not know. That is a definite answer.

A. I don't know.

Q. Therefore it may be possible that he can go several miles an hour and you do not know it, is that right?

A. Yes, I don't know.

WILLIAM HUGHES, sworn.

By Mr. SHIELDS:

Q. What is your business?

A. Keep a hotel.

Q. Where?

A. Ardmore, Montgomery county.

Q. And who is Mr. Fleming?

A. He is a partner of mine.

Q. And you are trading as Hughes & Fleming?

A. Hughes & Fleming.

By the COURT:

Q. A partner of yours in the hotel business?

A. Yes, an owner of property, not in the hotel business.

By Mr. SHIELDS:

Q. You are the owners of this horse, you and Mr. Fleming?

45 A. Mr. Fleming and I.

Q. How long had you owned Montauk?

A. I bought Montauk the first or second week in June, I don't know which it is.

Q. 1900?

A. 1900.

Q. How old was he?

A. Between four and five.

Q. Who did you buy him from?

A. Bought him from George Garth.

Q. How long had he been racing to your knowledge?

A. Well, he came to Belmont some time in April from Alabama, to be trained.
Q. From Alabama?
A. Yes, sir.
Q. What was his record?
A. I don't know whether or not he had any record before he got the record the day I bought him, that was sixteen and a quarter.
Q. The day you and your partner bought him, sixteen and a quarter?
A. Yes, sir.
Q. Was he sound?
A. He was sound; he hadn't a pimple on him.
Q. Where did you ship him from?
A. Which time?
Q. When you shipped him on at the time of the trouble,
46 at the time of the accident?
A. Shipped him from Island Park, New York.
Q. That is Albany, New York?
A. Albany to Cynwyd.
Q. Over the Pennsylvania?
A. Yes, sir.
Q. When did you last see the horse?
A. I seen the horse last——
Q. No, I mean prior to the shipment from Albany?
A. Two weeks before, I think.
Q. Was he in sound condition at that time?
A. Sound, all right.
Q. After the accident did you see him?
A. I seen him three days afterward.
Q. Three days after the accident?
A. Yes, sir.
Q. What was his condition then?
A. He was a wreck.
Q. What was the matter with him?
A. He had his tail broke and hip down, knocked off or down, whatever you should call it.
Q. And what else?
A. And he had a spavin throwed on the hind leg.
Q. How big was it?
A. That big a spavin (illustrating).
Q. Was he attended by a vete-nary surgeon?
A. He was attended by the railroad doctor.
47 Q. That was the railroad horse doctor?
A. Yes, sir.
Q. Was he attended by any veter-nary surgeon for you?
A. None at all, we had one to look at him.
Q. You had one look at him?
A. Yes, sir.
Q. But the horse was attended by the veterinary surgeon of the Pennsylvania Railroad Company?

A. Yes, sir.

Q. How long did that doctor of the railroad company attend him?

A. He is supposed to be attending him yet; I never discharged him; I told him to attend to him.

Q. The accident occurred nearly a year ago?

A. 12th of August.

Q. Is the horse in any better condition now?

A. A little bit of the stiffness is out of him.

Q. Some of the stiffness. Is he of any value at the present time?

A. None at all.

Q. You have bought and sold horses?

A. I bought a few.

Q. And you have seen them bought and sold?

A. Yes, sir.

Q. What was the value of this horse in the market, the market value of this horse?

A. When he was hurt?

Q. Yes.

48 A. Anywheres from twelve to twenty thousand dollars.

Q. And what is the value at the present time? I understand you to say nothing.

A. $2.50.

Cross-examined.

By Mr. SELLERS:

Q. Did you swear to the statement filed in this case?

A. I would have to see it first.

Q. No, Mr. Fleming is the one who swore to it. Mr. Fleming is your partner, and co-plaintiff in this suit?

A. Yes, sir.

Q. In the statement sworn to by Mr. Fleming, as plaintiff in this case, he swore that the value of that horse was ten thousand dollars; now you value it at a higher value than your partner, is that right?

A. I say it was worth anywheres from twelve to twenty thousand dollars.

Q. Then, as I say, you think that your partner undervalued this horse when he filed that statement?

A. I didn't know what he had valued him at.

Q. You are now told it was ten thousand dollars, and your opinion is it was worth more than ten thousand dollars, was it?

A. Yes, sir.

Q. You heard Mr. Wilkie testify. About what speed could that horse go at the present time?

A. At present?

49 Q. Yes.

A. Oh, I couldn't tell.

Q. I mean can he go faster than a walk?

A. Oh, yes, but he is lame.

Q. Of course he is not fit as a race horse?
A. He is lame.
Q. He is not fit as a race horse, but he has some speed in him, has he not?
A. Certainly, all horses have.
Q. Not as a race horse, but I mean as an ordinary horse.
A. He can hobble along the road a little faster than a walk, but I don't know what speed he would make, he is a lame horse and there ain't much speed in a lame horse.
Q. What did you pay for this horse?

Mr. SHIELDS: That is objected to.
The COURT: He bought it within what time of the occurrence, within a short time?

By Mr. SHIELDS:

Q. What day did you buy the horse?
A. I bought him the first or second week in June.

The COURT: And this accident happened in August?
Mr. SHIELDS: 12th of August.
The COURT: Where a man in a highly specialized kind of expert knowledge testifies in general as to the value in August, it seems to me that by way of critical comment it may be something to determine the probability of one figure or another of the market value by the price that he actually brought within sixty days.

Mr. SHIELDS: Go ahead.

By Mr. SELLERS:

Q. What did you pay for this horse?
A. Over six thousand dollars.
Q. The horse cost you over six thousand dollars?
A. Yes, sir.
Q. Who did you buy the horse of?
A. George Garth; in money and trade the horse cost me over six thousand dollars.
Q. How much did you give him in cash?
A. Four thousand dollars.
Q. Four thousand dollars in cash and then you gave him another horse?
A. I paid $1750. for it in Kentucky, and shipped her home and kept her all winter.
Q. You gave him another horse of the value of $1750.?
A. That I paid $1750. for.
Q. And you purchased it in June, 1900, and the accident happeded in the following August?
A. Yes, I purchased him the day he made his mark.

By the COURT:

Q. You purchased him after the record at Point Breeze had been made?

A. I purchased him just before it.

Q. Just before it?

A. Yes, sir.

51 Q. You purchased him before he ran?

A. Yes, he went one heat and I bought him when he came in.

Q. When is the record made?

A. When they come under the wire, when they race.

Q. There was one heat?

A. There was one heat.

Q. You saw him run?

A. Yes, sir.

Q. And you then bought?

A. I bought him.

Q. And then when is the record made, at the same time?

A. I think he made it in the second heat, I don't think it was the first heat.

Q. In the second heat?

A. It might have been the first heat, I don't know.

Q. How?

A. I don't know whether it was the first or second, but I bought him after he had went one heat, and then he finished the race.

Q. Do you remember whether his record was or was not known at that time?

A. I don't think he had a record, I don't know.

Q. I mean his record on that event there; he made a record there within a minute?

A. He got a record there.

Q. Was that a minute before or a minute after you bought?

A. I don't know whether it was the first heat or a second

52 heat he got his record.

Q. You do not know; you might have known that record when you bought?

A. I know what he got there.

By Mr. SELLERS:

Q. You say you saw the horse first go this heat before you bought him?

A. I seen him go one heat before I bought him.

Q. And he did that heat in two sixteen?

A. I am not sure whether that heat was in two sixteen or not.

Q. Can you recall what it was?

A. No.

Q. Mr. Wilkie said this horse made a record at Point Breeze of two sixteen; can you tell when he made that record?

A. The day I bought him, two sixteen and a quarter.

Q. After you bought the horse that day——
A. He finished the race.
Q. He finished the race?
A. He went one heat and then I bought him, and then he went two more.
Q. Then he went two more heats the same day?
A. Yes, same race.
Q. And you do not remember which heat he made that record?
A. No, I don't.
Q. Do you remember his speed for the three heats, do you remember what the three records were?
A. No, sir.

53 Re-direct examination.

By Mr. SHIELDS:

Q. Do you recall how much money you expended in the training of this horse in addition to the six thousand dollars that he cost you?

(Objected to. Question withdrawn.)

Q. How many stakes, and what were the value of them, that this horse was entered to race?

(Objected to. Question withdrawn.)

Q. You said that you saw him pace in two sixteen and a quarter?
A. Yes, sir.
Q. That was when you bought him?
A. The day I bought him.
Q. Or after you bought him——

(Objected to as leading.)

A. It was the day I bought him.
Q. How fast did you see him pace after you bought him?
A. Two-eight and a half.
Q. How long after you bought him did you see him pace in two-eight and a half?
A. Less than three weeks.

By the COURT:

Q. That two-eight and a half means what, a half miles or a whole mile?
A. A whole mile.

54 BENJAMIN F. A. FLEMING, sworn.

By Mr. SHIELDS:

Q. What is your business?
A. Hotel business.
Q. You are a partner of the gentleman who was just on the stand?

A. In property I am, yes.
Q. In this property?
A. Yes, sir.
Q. That is to say, in this horse?
A. Yes, sir.
Q. How long had you known the horse Mantauk?
A. Well, I saw him I think the first week Mr. Garth shipped him to Belmont, that was about April some time.
Q. Of 1900?
A. Yes, sir.
Q. How old was he?
A. He was between four and five years old.
Q. Did you see him perform?
A. I did.
Q. What did you see him do?
A. I saw him step a mile in a little better than eight and a half; my watch caught him two-eight and a quarter, and the last quarter of that mile in thirty seconds, a two mile shot.
Q. Prior to this accident was he sound?
A. He was perfectly sound.
Q. You have bought and sold horses?
55 A. I have.
Q. Race horses?
A. Yes, sir.
Q. Seen them bought and sold?
A. Yes, sir.
Q. You know their market price at the time the horse was injured?
A. I do.
Q. In August, 1900?
A. Yes, sir.
Q. What was the value of this horse in your opinion, at the date of his injury?
A. Well, I think I valued him very low at ten thousand dollars, very low.
Q. What is he worth now since the injury?
A. Oh, he is worth $2.50, that is if he was skinned.
Q. Practically nothing?
A. Yes, sir.
Q. Excepting for a dead horse. Was the horse attended after the accident?
A. He was attended by Dr. Cullen.
Q. What did you notice was the trouble with the horse after the accident?
A. Well, he couldn't hardly hobble, couldn't get along at all, his tail was broke, his hip was knocked off, and his back was sprained, and he had a thorough-pin or a bog-spavin; I think his leg
56 was that big round (illustrating) the first time I saw him after the accident, that was the morning of the accident.
Q. Was he attended by any veterinary surgeon?

A. Not at the time I saw him.
Q. Was he afterwards?
A. Yes, sir.
Q. Who was he, what doctor?
A. Dr. Cullen took care of him for the railroad company.
Q. He was sent there and employed by them?
A. Yes, sir.
Q. To look after the horse?
A. Yes, sir.
Q. Has he attended him since?
A. Not to my knowledge.
Q. Have you had any doctors look at him, any veterinary surgeons, with the hope of getting him cured?
A. I had one to look at him before I would unload him, and he advised me not to unload him off the car, and the railroad company took him in charge, and since that I took Dr. Bridge and this same doctor that saw him the day of the accident to where the horse was last week, and they looked him over; we have them here.
Q. You have them here in court?
A. Yes, sir.

Cross-examined.

By Mr. SELLERS:

Q. Will you sell that horse for $2.50?
A. Sell him for anything.
Q. Will you sell him for $2.50?
57 A. That is another consideration.

ROBERT J. FOX, sworn.

By Mr. SHIELDS:

Q. What is your profession?
A. Vert-inary surgeon.
Q. You have been practicing your profession how long?
A. Ten years, you might say.
Q. Were you called in professionally to see the horse Montauk?
A. I was.
Q. Will you describe his condition when you found him after this accident?
A. When I saw him on Sunday morning after the accident——
Q. Where was he?
A. At Cynwyd station, out on one of the branch lines of the Pennsylvania railroad.
Q. And in a car, or out of it?
A. In a box car.
Q. What did you find?
A. I found him suffering from intense pain and great agony, with broken tail, and the ligaments of the hock were ruptured, and in a very bad condition. His lumbar vertebræ was badly strained,

that is, the back across the kidneys, and his right hip, the corner of it was broken off.

Q. The corner of the right hip broken off?

A. Yes, sir.

Q. And what else?

A. That is about all, with the exception of his shuffling.

58 Q. When did he spring his spavin?

A. That was evidently done when he had this jar, this jar that he had at that time.

Q. You have heard of the accident, heard of the collision?

A. Yes, sir.

Q. Could that have produced what you observed in this horse?

A. Undoubtedly so, yes.

Q. Those ailments are traumatic?

A. Yes, sir.

Q. How did you diagnose the case, as curable or incurable?

A. I diagnosed it as incurable.

Q. Incurable?

A. Yes, sir.

Q. Have you seen him recently?

A. I have, yes, sir.

Q. In your opinion was that a true diagnosis?

A. Yes, sir.

Q. What is his condition now?

A. His condition now is practically a cripple.

Q. Is he of any value at all?

A. No, he is not.

Q. Can he ever be cured?

A. No, he cannot be made sound, in my opinion.

A. Hopelessly incurable?

A. Yes, in my opinion, in my judgment.

A. In your opinion?

59 A. Yes, sir.

Q. You were in the habit of treating race horses?

A. Yes, that is mainly my practice.

Q. That is mainly your practice?

A. Yes, sir.

Q. And therefore you have an opportunity of knowing them and meeting them continuously?

A. Every day most.

Q. You know the value of them?

A. Well, yes, about the value, yes.

Q. What in your opinion was the value of this horse Montauk before the accident?

By Mr. SELLERS:

Q. Did you see this horse before the accident?

A. Before the accident?

Q. Yes.

A. No.

Mr. S-LLERS: Then I object to his expressing an opinion.

(No cross-examination.)

CHARLES A. BRIDGE, sworn.

By Mr. SHIELDS:

Q. You are a veterinary surgeon?
A. Yes, sir.
Q. And have been practicing your profession how long?
A. Fifteen years.
60 Q. Were you called recently to see the horse Montauk?
A. Yes, sir.
Q. Where did you find him?
A. Out the other side of Norristown at a place called Hickorytown.
Q. Was Dr. Fox with you?
A. Yes, sir.
Q. The gentleman who was just on the stand?
A. Yes, sir.
Q. Did you make an examination?
A. I did.
Q. With the expectation of testifying?
A. Yes, sir.
Q. What did you find is the condition of the horse at the present time?
A. Practically worthless.
Q. Will you tell us why?
A. He has a hip-down on the right side, he has a fracture of the, to put it in plain English, the tail, and a thorough-pin, a bone spavin, on the right hind leg.

By the COURT:

Q. What is a bone spavin?
A. That is an enlargement of the hock, a bone deposit.

By Mr. SHIELDS:

Q. Is this enlarged appreciably?
A. Yes, sir.

61 By the COURT:

Q. That is produced by violence?
A. Yes, sir.
Q. Is it curable?
A. No, incurable.

By Mr. SHIELDS:

Q. Did you meet the Pennsylvania railroad veterinary surgeon out there?
A. No.

Q. You didn't happen to meet him?
A. No.
Q. Dr. Cullen?
A. No.
Q. You know him very well?
A. I know of him.
Q. He is here?
A. I don't know.

(No cross-examination.)

GEORGE M. GARTH sworn.

By Mr. SHIELDS:

Q. What is your business?
A. I breed and develop horses; I have a farm in Alabama and I breed and develop horses, race horses.
Q. Where are you located?
A. I am located on my farm during the winter months, and I ship my horses east in the summer months.
62 Q. What part of Alabama?
A. Cortland, Lawrence county.
Q. You have been in that business how long?
A. I suppose about ten years, nine or ten years, something of that sort or like that.
Q. Did you own this horse Montauk?
A. I did.
Q. How long?
A. I bought him when he was three years old at the Jewell farm sale; I shipped him to my farm and kept him until the spring he was five, and I shipped him East, the spring he was five, to Belmont park, about the middle of May; I shipped him from home about the 8th, and it took about four or five days, about the 12th or 13th.
Q. Of May, 1900?
A. Of May, 1900. I shipped him—re-shipped him to Baltimore, started him twice in races there and then shipped—then led him across the road to Point Breeze track, and started him in a race there, which was the time I sold him to Messrs. Hughes & Fleming.
Q. How was he sired?
A. He was sired by Brownheld, two-twelve and a half, the only sire of a two minute harness horse, one-fifty-nine and a quarter, Star Pointer.
Q. Standard bred, the sire?
A. The sire was standard, and under the highest rules, that of production and that of lineage or inheritance.
63 Q. Does being standard bred add to the value of a horse?
A. Exceedingly so, very much.
Q. Do you know any other get of this sire other than Montauk?
A. Elastic Pointer sold as a blind horse by the same sire last year.

(Objected to by Mr. Sellers.)

Q. Did you see this horse after he had made the record of two-sixteen and a quarter?

A. I did; I finished the race with him after the—it was sixteen and a quarter or sixteen and a half, the year books will bear it out; that is immaterial, however, the fraction of a second.

Q. What in your opinion was that horse worth in August, if sound?

A. It seems to me that I can more intelligently state to the satisfaction of the judge and jury by giving the price of a horse by the same sire——

Mr. SELLERS: I object to having that price given.

A. (continued.) I would regard him surely worth ten thousand dollars, surely worth that; I think a man would be safe in that proposition.

Q. And you have dealt in race horses for how many years?

A. I have dealt in race horses for about ten years.

Q. Buying and selling them?

A. Buying and selling them.

Q. You spoke of a blind horse——

64 A. By the same sire.

Q. By the same sire, and blind?

A. Yes, sir.

Q. Did you see that horse sell in the market?

(Objected to by Mr. Sellers.)

Q. In your opinion, I understand you to say, this horse was worth ten thousand dollars at the lowest estimate?

A. Yes, sir.

Cross-examined.

By Mr. SELLERS:

Q. You sold this horse directly to Mr. Hughes yourself?

A. I did.

Q. Did you drive him the day he made the record of two-sixteen?

A. I did.

Q. That was after he had made that record that you had sold him to Mr. Hughes?

A. Immediately after he took the first heat in that time that I sold him to Messrs. Hughes and Fleming, yes, sir.

Q. And what did you sell him for?

A. I got four thousand dollars in money, and I got a chestnut sorrel mare, a chestnut mare by a Kentucky sire, at $1750, that they showed me their receipt that they had received from Scott Newman, Jr., of $1750, and then they turned me over the amount of money that they had paid out—a receipt from the several associations, or a statement taken from the receipts from the several associa-

65 tions for stake money they had paid out on this mare, they turned that money that they had paid out on this mare,

and the mare that they had paid $1750 for, and four thousand dollars in cash they gave me.

Q. Those stake moneys that you referred to, what were they?

A. Really, I could not intelligently answer that, because I did not foot that amount up, perhaps Mr. Fleming has that on his book and can produce that.

Adjourned until Wednesday, May 8th, 1901, at 10 a. m.

Second day.

WILLIAM HUGHES and BENJAMIN F. A. Fleming, Trading as Hughes & Fleming, v. THE PENNSYLVANIA RAILROAD CO. } No. 39, C. P. No. 2, S. 1900.

PHILADELPHIA, *May 8th*, 1901.

THOMAS S. YOUNG, sworn.

By Mr. SHIELDS:

Q. What is your business?

A. I am in the horse business at 142 North Broad street.

66 Q. And dealing in high class horses?

A. High class horses, yes sir.

Q. And you have been in that business how long?

A. About twenty-three years.

Q. Did you know the horse Montauk?

A. Yes, sir.

Q. Prior to his injury?

A. Yes, saw him at Point Breeze when he got his record there, and saw him once or twice at Belmont before that.

Q. What in your opinion was the value of that horse?

A. Well, he was an awful fast horse and I think he was worth anywheres from twelve to fourteen thousand dollars.

Cross-examined.

By Mr. SELLERS:

Q. What was the record you saw him make?

A. Sixteen and a fraction, I don't remember just what the fraction was.

Q. And that was his record was it?

A. That was his record.

Q. When was that done, do you know?

A. I don't remember the exact date, it was the meeting they had at Point Breeze in the spring.

By the COURT:

Q. Is that a high record?

A. It is not a high record, but the way he finished the mile
67 would convince anybody that he was an awful fast horse; he just played with them, just beat them in the last quarter as if he was a free-for-all horse; I don't think there ever was a horse that ever closed up a gap like this horse did that day; everybody was astonished at the speed he showed.

Q. It was the speed in the last quarter?

A. Yes, in the last two quarters, you might say.

By Mr. SELLERS:

Q. Was that his only race that you know of?

A. Oh, no, from what I read in the papers of other races, he was in, when he got a—I only read in the papers about him after that.

By Mr. SHIELDS:

Q. Was he well known among horsemen?

A. Well known; everybody knew about him.

By the COURT:

Q. He was a horse of reputation?

A. Yes, sir.

WILLIAM MCFARLAND, sworn.

By Mr. SHIELDS:

Q. What is your business?

A. Selling horses.

Q. Where is your place of business?

A. McFarland's Exchange, Broad and Cherry.

68 Q. You have an exchange there for the purchase and sale of horses?

A. Yes, sir.

Q. Did you know the horse Montauk before he was injured?

A. Yes, sir.

Q. What in your opinion was his value?

A. Anywhere from ten to twelve or thirteen thousand dollars.

Cross-examined.

By Mr. SELLERS:

Q. Did you ever see him race?

A. I saw him race at Point Breeze.

Q. You saw him make that mile in two-sixteen?

A. Yes, sixteen and a fraction, I think.

By the COURT:

Q. What did you say was his value?

A. Anywhere from ten to twelve or thirteen thousand dollars.

By Mr. SELLERS:

Q. Have you seen the horse since the accident?

A. No, never saw him except at Point Breeze in the race.
Q. Do you know anything about Mr. Fleming or Mr. Hughes purchasing that horse at that date; did they purchase it that day, as far as you know?
A. I understood so, yes.

69 GEORGE W. COOK, sworn.

By Mr. SHIELDS:

Q. What is your business?
A. Stable keeper.
Q. You have bought and sold horses?
A. Yes, sir.
Q. For how long?
A. I have been in the business for thirty-five years.
Q. Did you know this horse?
A. Yes, sir.
Q. What in your opinion was his value?
A. I thought he was a cheap horse, when I saw him step at Point Breeze, at ten thousand dollars.

Cross-examined.

By Mr. SELLERS:

Q. Did you see him make that mile in two-sixteen?
A. Yes, sir.

JOSHUA EVANS, sworn.

By Mr. SHIELDS:

Q. How long have you been connected with the horse business?
A. Thirty-five years.
Q. During that time you have bought and sold a great many horses?
70 A. Yes, sir.
Q. Did you know the horse Montauk?
A. Yes, I seen him at Belmont and Point Breeze.
Q. What in your opinion was his value?
A. Well, I should judge anywheres from twelve to fourteen thousand dollars.
Q. From twelve to fourteen thousand dollars?
A. Yes, sir.

(No cross-examination.)

WESLEY T. WRIGHT, sworn.

By Mr. SHIELDS:

Q. What is your business?
A. Harness and turf goods.
Q. Have you bought and sold horses?
A. Yes, sir.

Q. Did you know the horse Montauk?
A. Yes, sir.
Q. What in your opinion was the value of that horse?
A. I valued him at ten thousand dollars.
Q. You valued him at ten thousand dollars?
A. Yes, sir.

Cross-examined.

By Mr. SELLERS:

Q. Did you ever own any horse that made records of two-sixteen?
71 A. Not records, but I have owned horses that went faster than that.
Q. What horse did you own that went faster than that?
A. I owned Albert Allen, faster than sixteen and a quarter.
Q. What did Albert Allen go at?
A. He went in fifteen and three-quarters more than once.
Q. What did you pay for him?
A. I dealt for him.
Q. What was it sold for, what did that horse bring at a sale?
A. I can't tell you that for this reason, I dealt in horses, I dealt other horses.
Q. What do you know about the value of that horse which you speak of? You are called here as an expert, and your opinion is asked upon your experience with horses. I want to see just what your experience has been, and what you have bought and sold of faster horses, and you mention one which went in two-fifteen; you say you did not buy that horse yourself, but you dealt it in for some one else?
A. No, I dealt in him for myself, but didn't buy to race, but bought as a road horse.
Q. What did it cost you as a road horse?
A. I judge it cost me fifteen hundred dollars.
Q. What became of him?
A. I have had him until the past six weeks, I sold him, traded him within the last six weeks.
Q. What did you sell him for within the last six weeks?
72 (Objected to. Objection overruled.)
A. I dealt him again.
Q. For how much?
A. Well, I got about seven hundred dollars money and dealt him for other goods, harness and wagons and horses.
Q. What was the aggregate valuation of the other goods?
A. Seven hundred and fifty dollars.
Q. And that horse went in two-fifteen?
A. He had two years ago, yes.
Q. What did he do in the last two years, what has happened to that horse that has reduced his value?

A. I met with an accident, hit by a trolley car, marked him and cut him up considerably, and I consider that depreciated his value five hundred dollars for that one accident.

Q. What other horses have you owned that have made records? Have you owned any other horses that have made records?

A. Yes, sir.

Q. Which horse?

A. Loudell.

Q. What was that record?

A. At the time I owned him he had a record of twenty-five and a half.

Q. What did you pay for that horse?

A. Nine hundred dollars.

Q. What did you sell him for?

A. I dealt him for other horses.

Q. What was the aggregate value of the things that you
73 took in exchange for that horse?

A. I got fifteen hundred dollars for him.

THOMAS GRADY, sworn.

By Mr. SHIELDS:

Q. What is your business?

A. Trainer of horses.

Q. You have been a trainer of horses for how long?

A. Twenty-five or twenty-six years.

Q. Did you know the horse Montauk?

A. Yes, sir.

Q. Did you have charge of him professionally?

A. Yes, sir.

Q. For how long?

A. Well, from about the second week in June, first or second week in June, up until he got hurt in August.

Q. And then you handled him for a matter of a month or two?

A. Yes, sir.

Q. Did you drive him frequently?

A. Yes, sir.

Q. What speed did he show?

A. He showed me a mile in seven and one-quarter.

A. Showed you a mile in seven and one-quarter?

A. Yes, sir.

By the COURT:

Q. A mile in what?

A. Two-seven and one-quarter.

74 By Mr. SHIELDS:

Q. More than once?

A. That is the only time ever I drove him to see how fast he could go.

Q. What was the age of the horse?
A. Five years old.
Q. He was young and untried, was he not?
A. Yes, sir.
Q. What you call a green horse?
A. What you would call a green horse; he had a record of sixteen and one-quarter when the old gentleman bought him, the day he bought him.

By the COURT:

Q. Is two-seven and a quarter a high record?
A. Very, yes, sir.
Q. Very high?
A. Yes, sir.
Q. At the date when he did that what was the high record?
A. Oh one-fifty-nine and three-quarters, or one-fifty-nine and a half, or something like that.
Q. That was the top notch?
A. That was the top notch, by a horse bred about—that is, sired by the same horse.

By Mr. SHIELDS:

Q. How was this horse bred?
A. He was sired by Brownheld, the sire of Star Pointer; his dam I don't remember.
Q. Was that regarded as standard?
75 A. Very, very high.
Q. Very high standard?
A. Yes, sir.
Q. Did you see the horse after he was hurt?
A. Yes, sir.
Q. Did you attempt to do anything with him?
A. No, they came to me and wanted me to take him out of the car, the station agent did, and I looked at the horse, and I says, "I won't take him," and then I went to get Mr. Fleming; I got Mr. Fleming, the owner of the horse, and I brought him down and he refused to take him.
Q. What was the matter with him?
A. Well, he was all scarred up, and he had a hock on him as big as that (illustrating), his tail was broken, the point of one hip was down; and he stood just all humped like a horse would that was all pushed together, you know, and they took him back to Fifty-second street, and Mr. Cullen took him in charge.
Q. That is, Dr. Cullen, the Pennsylvania Railroad doctor?
A. Yes, sir.
Q. How long was the horse on the cars?
A. I shipped him on Friday night at about half past six from Albany; we got in Weehawken, that is, in Jersey City, at four o'clock in the morning; at four o'clock, or at six o'clock that morning, they turned him over to the Pennsylvania railroad, or tend-

ered him, brought him out on the meadows there, on a side track they have got, and they let him stand there from six
76 o'clock until ten o'clock that night before they touched him again.

Q. From six o'clock in the morning?
A. From six o'clock in the morning until ten o'clock that night.
Q. He stood in the yard?
A. He stood in the yard.

By the COURT:

Q. What yard?
A. The yard of the Pennsylvania railroad.
Q. Where?
A. In Jersey City.

By Mr. SHIELDS:

Q. How long was he in the yard in Philadelphia?
A. Then they hitched on to him and brought him to Philadelphia and landed him up at Fifty-second street.

By the COURT:

Q. When?
A. There they set him on a side track.
Q. Do you know when they got to Fifty-second street?
A. Saturday morning at four o'clock.

By Mr. SHIELDS:

Q. Saturday or Sunday?
A. On Sunday morning at four o'clock.
Q. How long did he remain there?
A. He remained there from four o'clock in the morning.

By Mr. SELLERS:

Q. Before you continue any further, are you testifying now
77 of your own knowledge or of what you learned from others?
A. I am testifying what the young man told me that was in charge.

By Mr. SHIELDS:

Q. Did not you get it also from the railroad people?
A. Yes.

Mr. SELLERS: I object to your testifying to anything except what you know of your own knowledge, about the movements of that horse.

The COURT: That is a good objection.

Mr. SHIELDS: If it is objected to I will not press it.

Mr. SELLERS: It is objected to.

By Mr. SHIELDS:

Q. How long was the horse on the car after he was hurt?

By Mr. SELLERS:

Q. Do you know of your own knowledge how long it was?
A. Yes. Well, no, I don't. At seven o'clock——

The COURT: If you do not know do not testify.

A. (continued). I know this much, at seven o'clock the young man in charge of him came and got me, and about ten o'clock——

By Mr. SHIELDS:

Q. Seven o'clock in the morning?
A. Yes, sir.
Q. And at ten o'clock?
A. At ten o'clock the railroad company, the agent of the railroad station came again and he wanted me to take the horse off, and let the case be dependent. I says, "No, the owner wouldn't
78 take him off and I shall not."
Q. Have you seen the horse since that?
A. I have had him in charge pretty much ever since, all but the time Mr. Cullen, excepting the time Mr. Cullen had him.
Q. He is the veterinary surgeon for the railroad company?
A. Yes, sir.
Q. In your opinion, from your knowledge of horse flesh, is it possible for this horse ever to be cured?
A. I would not think so, no.
Q. In your opinion is he worth anything now?
A. Only what a lame horse would be worth, from fifty to seventy-five or one hundred dollars to work.
Q. To work?
A. Yes, sir.
Q. But a lame horse is not a very good worker?
A. No, that is right.
Q. What in your opinion was the value of this horse, having handled him and knowing the value of horse flesh?
A. I thought this horse ought to be worth anywhere from eighteen to twenty thousand dollars; I had an idea I could drive this horse last fall a mile in two minutes.
Q. That is your belief?
A. Yes, I drove him a quarter in thirty seconds.

Cross-examined.

By Mr. SELLERS:

Q. Is that your signature?

(Paper shown witness.)

A. Yes, sir.
79 Q. That is the shipping receipt that you signed?
A. Yes, sir.
Q. Do you know whether any insurance was effected on this horse?

A. No, I don't.
Q. You say you do not know?
A. No, sir.
Q. Have you the bill of lading under which this horse was shipped?
A. No, that is the only bill I had.
A. But was there not also a bill of lading sent?
A. Well, here it is, I think (indicating).
Q. This is the bill of lading, it is not, under which this horse was shipped?
A. Yes. Just a minute, let me see; yes, that is it.
Q. Do you know what were the freight charges paid on this horse; do you know what was the amount of the freight charges paid on this horse?
A. Yes.
Q. How much?
A. Twenty-six dollars and some cents, I don't remember the charge.
Q. Twenty-six dollars and some cents?
A. I think there was some cents to it; now I don't just remember; they charged, you know, for four thousand pounds; this horse weighed about twelve hundred or eleven hundred. They charged pretty well.
80 Q. What is the usual charge when a horse is shipped first class, do you know?
A. The usual charge?
Q. Yes.
A. I would not think it could be any more than that unless you shipped him by express; they charged four thousand pounds for this horse; the horse will weigh about ten or eleven hundred pounds, maybe eleven hundred and fifty.
Q. This was not a first class charge, first class rate of freight for the transportation of this horse. Was not this a reduced rate?
A. Not that I know of; I would not consider it so, and I don't believe you would, if you were shipping many horses about the country.
Q. You do not know whether any insurance has been paid on this horse?
A. I don't know.

FRANK H. JACKSON, sworn.

By Mr. SHIELDS:

Q. What is your business?
A. Horse training.
Q. And are you also acquainted with the value of horses?
A. Yes, sir.
Q. In recent years?
A. Yes, sir.
Q. Did you know this horse Montauk?

81 A. I did.
Q. What in your opinion was his value?
A. I would value a horse like Montauk, when I saw him at one time, at least fifteen thousand dollars.
Q. Fifteen thousand dollars?
A. I think that I am justified in saying so.

Cross-examined.

By Mr. SELLERS:

Q. What is the greatest record that any horse ever made that you owned?
A. I never owned any.
Q. You never bought or sold a horse that made a record?
A. I have bought and sold, yes.

CHARLES B. MYERS, affirmed.

By Mr. SHIELDS:

Q. What is your business?
A. I have a public training stable.
Q. A public training stable?
A. Yes, sir.
Q. You have been handling fast horses?
A. Yes, sir.
Q. For how long?
A. About forty years.
Q. Did you see this horse Montauk?
A. Yes, sir.
Q. What in your opinion was his value?
82 A. I valued him from in the neighborhood of ten thousand to twelve th-usand dollars sure.
Q. Ten to twelve thousand dollars sure?
A. Yes, sir.
Q. What is it that makes a trotting horse like this valuable as compared with other horses.
A. Extreme speed, with a good actor.
Q. Extreme speed and a good actor?
A. And not out-classed.
Q. And that horse possessed all those qualifications?
A. All of them.
Q. He was green also, was he not?
A. Yes, sir.
Q. That was an additional qualification?
A. Certainly, age, soundness and everything combined.

Cross-examined.

By Mr. SELLERS:

Q. Have you ever owned any race horses?
A. Yes, sir.

Q. What was the best record any horse of yours ever made?
A. I have been so fortunately fixed that I have handled mostly for other people, although I have one now that can beat two-twenty, a young horse.
Q. What is the best record that any horse that you ever owned made?
A. Well, as far as my own horses, I never really owned entirely, but very few of them, myself.
83 Q. What is the best record that any horse that you ever owned made?
A. Two-twenty.
Q. What did you pay for that horse?
A. I bought him when he was considered nothing and made him.
Q. After you made him did you sell him?
A. No, sir.
Q. What became of him?
A. He went wrong; I sold him, yes, but I sold him as an out-classed horse, a cripple, no account for what I wanted; that is the reason I sold.

By Mr. SHIELDS:

Q. You have known some horses to sell for $250. and bring $25,000, have you not?
A. Yes, that is my business, to buy a horse and develop him.
Q. And develop him?
A. Yes, and when he is developed his speed makes his price.
Q. Some of the horses you made history were purchased for a song, were they not?
A. They are out-classed, they are no account, only as a gentleman's road horse.

By Mr. SELLERS:

Q. What horse do you know of that was purchased for $250* which subsequently sold for $25,000, mention one.
A. I won't pretend to do that just now, but then if you will give me a couple of hours, I will at least show you twenty. I will
84 give you J. I. C. he fetched one hundred, he was bought for one hundred dollars.

By Mr. SHIELDS:

Q. What did he sell for?
A. He had refused fifty thousand dollars for him.

By Mr. SELLERS:

Q. What horse was that?
A. J. I. C.
Q. You do not consider J. I. C. a good horse?
A. I don't? The best horse in his day on earth.

Mr. SHIELDS: The defendant admits that it is a Pennsylvania corporation. I desire that to go on the record, and we rest.

Mr. SELLERS: I would like to have Mr. Fleming recalled.

BENJAMIN F. A. FLEMING, recalled.

By Mr. SELLERS:

Q. Was there any insurance on this horse?
A. In what way?
Q. You know what it is to have insurance on a horse?
A. No, I never had him insured.
Q. Do you know whether anybody else had him insured?
A. Not to my knowledge.
Q. You do not know whether this horse was insured at all?
85 A. No.
Q. Do you know whether any money has been paid on that horse by any insurance company at any time?
A. Not as I know of.
Q. Not as you know of?
A. No, I never had any insurance.
Q. As far as you know of, you do not know of any insurance?
A. No.

WILLIAM HUGHES, recalled.

By Mr. SELLERS:

Q. Was there any insurance on this horse?
A. Not as I know of.
Q. You never got anything from any company on him?
A. No, I don't insure my buildings; I don't believe in insuring them.

Defendant's Testimony.

GEORGE J. COUGHTRY, sworn.

By Mr. SELLERS:

Q. On August 10, 1900, you were in the employ of the West Shore railroad at Albany?
A. Yes, sir.
Q. Will you please look at that and tell us what it is, and also say whether that is your signature?

(Paper shown witness.)

86 A. Yes, that is a live stock contract, a release between Thomas Grady and the West Shore railroad.
Q. It has been testified by Mr. Grady in this case that he paid twenty-six dollars and some cents freight charges on this horse; were those first class freight charges?

Mr. SHIELDS: That is objected to.

The COURT: That is rather leading.

Q. What are the usual freight charges from Albany to Cynwyd?
A. Well, I could not say as to that.
Q. What are the usual freight charges for the shipment of live stock?
A. Twenty per cent.
Q. Twenty per cent. of what?
A. Twenty per cent. higher than the usual tariff without a contract.
Q. Twenty per cent. higher?
A. Yes, twenty per cent.
Q. That is twenty per cent. on a hundred dollars.
A. Yes, sir.
Q. It has been testified by Mr. Grady that he paid twenty-six dollars freight charges; were those reduced freight charges?

Mr. SHIELDS: That is objected to.
The COURT: That question has been overruled as leading.

Q. Suppose that this horse had been shipped simply by a bill of lading without this paper, what would have been the freight charges on that?

87 (Objected to by Mr. Shields.)

Q. What are the charges under this paper?
A. They are twenty per cent. less than the tariff rates; under a live stock contract, the same as that is between the parties, they get a rate of twenty per cent. less than first class rates.
Q. Do you know what the first class rates are?
A. No, I do not.

(No cross-examination.)

GEORGE R. GRAHAM, sworn.

By Mr. SELLERS:

Q. By whom are you employed?
A. Pennsylvania railroad.
Q. In what capacity?
A. As a ticket agent and assistant to the agent.
Q. Do you know what the freight charges are from Cynwyd to Albany?
A. The freight charges from Cynwyd——

The COURT: You mean from Albany to Cynwyd?

Q. Are the freight charges from Cynwyd to Albany the same as they would be from Albany to Cynwyd?
A. They are the same thing.
Q. What are those charges?
A. The freight charges, first class rate, from Albany to Jersey City would be twenty-five cents a hundred, and from Jersey City to

Cynwyd, local rate would be twenty-four cents a hundred, as we have no rating that way for the West Shore road.

88 Q. What would be the rate of live stock shipped under such a contract as this?

A. It would be first class rate.

Q. Under this?

A. Under that reduced rate.

Q. Reduced rate?

A. Reduced rate, yes, sir.

Q. If a horse is valued at ten thousand dollars, and was shipped from Albany to Cynwyd under the rate that you have said, what would be the amount of freight charges?

A. I don't know exactly what would be the exact amount.

By the COURT:

Q. Did not you say the rates of freight were proportioned to the weight of the thing shipped? What do you mean by twenty-five cents a hundred?

A. A hundred pounds.

Q. That is, a hundred pounds weight of the thing shipped, that is forty-nine cents per hundred pounds. That would make nearly six dollars for a first class freight.

(No cross-examination.)

89 Mr. SELLERS: I offer in evidence the shipping receipt and also the bill of lading which has been identified and admitted. Those two are offered in evidence.

(The papers offered are as follows:

West Shore railroad.

N. Y. C. & H. R. R. Co., lessee.

Live Stock Contract.

ALBANY (CHURCH ST.) STATION, *Aug.* 10*th*,* 1900.

This agreement, made this ninth day of August 1900 by and between the New York Central & Hudson River Railroad Company, lessee of West Short railroad, hereinafter called the carrier, and Thomas Grady, hereinafter called the shipper:

Witnesseth: That the said shipper has delivered to the said carrier live stock of the kind and number, and consigned and destined by said shipper as follows:

Consignee, destination, etc.	Number and description of stock (shipper's load and count).
Thomas Grady, Cynwyd, Montgomery Co., Pa.	One horse & traps.
Advance charges $— Car. Nos. and initials —	(Revenue stamp.)

for transportation from —— to destination, if on the said carrier's line of railroad, otherwise to the place where said live stock is to be received by the connecting carriers for transportation to or toward destination and that the same has been received by said carrier for itself and on behalf of connecting carriers, for transportation, subject to the official tariffs, classifications and rules of the said
90 company, and upon the following terms and conditions, which are admitted and accepted by the said shipper as just and reasonable, viz:

That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of — per — which is the lower published tariff rate upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers, or their employees or otherwise.

If horses or mules—not exceeding one hundred dollars each.

If cattle or cows—not exceeding seventy-five dollars each.

If fat hogs or fat calves—not exceeding fifteen dollars each.

If sheep, lambs, stock hogs, stock calves, or other small animals—not exceeding five dollars each.

And in no event shall the carrier's liability exceed $1200 upon any car load.

That said shipper is to pay all back charges and freight
91 paid by said carrier or connecting carrier upon or for the transportation of said live stock.

That the said shipper is at his own sole risk and expense to load and take care of, and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same, and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same.

That the said shipper is to inspect the body of the car or cars in which said stock is to be transported, and satisfy himself that they are sufficient and safe, and in proper order and condition, and said carrier or any connecting carrier shall not be liable on account of any loss of or injury to said stock happening by reason of any alleged insufficiency in or defective condition of the body of said car or cars.

That said shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock, and said carrier or any connecting carrier shall not be liable on account of the escape of any of the said stock from said car or cars.

The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said live stock occasioned by any or either of the following causes, to wit: Overloading crowding one upon another, kicking or goring, suffocating, fright,
92 burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold, or by changes in weather, or for delay caused by stress of weather, or obstruction of track, by riots, strikes or stoppage of labor, or from causes beyond their control.

That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employees, or its connecting carriers, or their employees, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage, sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said stock, while so detained. That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of said shipper, or his agent, and delivered to the general live stock agent of the said carrier at his office in New York, within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs.

That whenever the person or persons accompanying said stock under this contract, to take care of the same, shall leave the
93 caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier, nor its connecting carriers, shall be required to stop or start their trains or caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock to take care of the same under this contract.

And it is further agreed by said shipper, that in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier, or its connecting carriers, without charge other than the sum paid or to be paid for the transportation of the live stock in charge of which he is, that the said shipper shall and will indemnify and save harmless said carrier, and every connecting carrier, from all claims, liabilities and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said

stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employés, or otherwise.

And Thomas Grady does hereby acknowledge that he had the option of shipping the above described live stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers, and thereby receiving
94 the security of the liability of the said carrier and connecting railroad and transportation companies, as common carriers of the said live stock, upon their respective roads and lines, but has voluntarily decided to ship same under this contract at the reduced rate of freight above first mentioned.

THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY,
Lessee West Shore Railroad,
By A. T. BENJAMIN, *Station Agent.*

Witness my hand
THOMAS GRADY, *Shipper.*

Release for Man or Men in Charge.

In consideration of the carriage of the undersigned upon a freight train of the carrier or carriers named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train, of the live stock mentioned in said contract, of which live stock I am in charge, the undersigned does hereby voluntarily assume all risk of accidents or damage to his person or property, and does hereby release and discharge the said carrier or carriers from every and all claims, liabilities and demands of every kind, nature and description, for or on account of any personal injury or damage of any kind sustained by the undersigned so in charge of said stock, whether the same be caused by the negligence of the said carrier or carriers, or any of its or their employees, or otherwise.

HARRY WILKIE,
Signature of Man in Charge."

95 West Shore railroad.

N. Y. C. & H. R. R. R. Co., lessee.

Uniform Bill of Lading Conditions.

1. No carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereof or damage thereto, by causes beyond its control; or by floods or by fire; or by quarantine; or by riots; strikes or stoppage of labor; or by leakage, breakage, chafing, loss in weight, changes in weather, heat, frost, wet, or decay; or from any cause if it be necessary or is usual to carry such property upon open cars.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable despatch as its general business will permit. Every carrier shall have the right in case of necessity, to forward said property by any railroad or route between the point of shipment and the point to which the rate is given.

3. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place
96 and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event. Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property.

4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be carried hereunder, shall have the privilege at its own cost of compressing the same for greater convenience in handling and forwarding, and shall not be held responsible for deviation, or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is an elevator may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered, and placed with other grain of same kind, without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder. No carrier shall be liable for differences in weight or for shrinkage or any grain or seed carried in bulk.

97 5. Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination may be kept in the car, depot or place of delivery of the carrier at the sole risk of the owner of said property, or may be at the option of the carrier, removed and otherwise stored at the owner's risk and cost and there held subject to lien for all freight and other charges. The delivering carrier may make a reasonable charge per day for the detention of any vessel or car and for use of track after the car has been held forty-eight hours for unloading, and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor. Property destined to or taken from a station at which there is no regularly appointed agent, shall be entirely at risk of owner when unloaded from cars, or until loaded into cars, and when received from or delivered on private or other

sidings shall be at owner's risk, until the cars are attached to, and after they are detached from, trains.

6. No carrier hereunder will carry, or be liable in any way for any documents, specie or for any article of extraordinary value not specifically rated in the published classifications, unless a special agreement to do so, and a stipulated value of the articles, are endorsed hereon.

7. Every party, whether principal or agent, shipping inflammable, explosive, or dangerous goods, without previous full written
98 disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense, or destroyed without compensation.

8. Any alterations, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading shall be void.

9. If the word "order" is written hereon immediately before or after the name of the party to whose order the property is consigned (without any condition or limitation other than the name of a party to be notified of the arrival of the property) the surrender of this bill of lading properly endorsed shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading.

10. Owner or consignee shall pay freight at the rate herein stated, and all other charges accruing on said property, before delivery, and according to weights as ascertained by any carrier hereunder; and if upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the rates and under the rules provided for by published classifications.

99 11. If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the conditions, whether printed or written, contained in this bill of lading, including the condition that no carrier or party shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other water; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; or from collision, stranding, or other accidents of navigation; or from the prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have liberty to call at intermediate ports; to tow and be towed, and to assist vessels in distress, and to deviate for the purpose of saving life or property. And any carrier by water, liable on account of loss of or damage to any of said property, shall have the full benefit of any insurance that may have been effected upon or on account of said property.

West Shore railroad.

N. Y. C. & H. R. R. R. Co., lessee.

Received, subject to the classification in effect on the date of issue of this bill of lading, at —— station Aug. 10, 1900, from Thomas Grady, the property described below in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said com-
100 pany agrees to carry to said destination, if on its road, otherwise to deliver to another carrier on the route of said destination. It is mutually agreed in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route, to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (see conditions on back hereof), and which are agreed to by the shipper and accepted for himself and his assigns as just and reasonable.

Marks.	Description of articles.	Weight subject to correction.
Consignee Thomas Grady. Place Cynwyd. County Montgomery State Pa.	One horse & traps. Man in charge.	

(Revenue stamp.)

Route 12352 M. C.
Charges advanced $—
Car No. —

A. T. BENJAMIN, *Agent.*

(The signature of the agent here acknowledges only the receipt of the property, and the charges advanced, if any.)

The blank spaces below most not be filled up by the shipper.

The rate of freight from —— to —— is, in cents per 100 pounds:—

— times.	Second class —	Fifth class —
First class —	Third class —	Sixth class —
First class —	Fourth class—	Special class —

—— ——, *Agent.*

(The signature here acknowledges only the rate given.)

101 Received $— to apply in prepayment of the charges on the property described above.

—— ——, *Agent.*

(The signature of the agent here acknowledges only the amount prepaid.)

(On margin:) Not negotiable.—If the word "order" is written immediately before or after the name of the party to whose order

the property is consigned, the surrender of the bill of lading, properly endorsed, shall be required before the delivery of the property at destination, as provided by section 9 of the conditions of the uniform bill of lading, on the back hereof.")

Rates will be inserted by division freight agents at New York, Syracuse or Buffalo.)"

GEORGE R. GRAHAM, recalled.

By Mr. SELLERS:

Q. Can you explain to the court and jury what this $26. which was paid by Mr. Grady was paid for?

(Objected to.)

A. I received the shipment——

By the COURT:

Q. Did you make any arrangements with the party who paid?

By Mr. SELLERS:

Q. Did you receive the freight charges?

A. I received——

102 Q. From the party who paid it?

A. From the party who paid it.

The COURT: What was said between them?

Q. What was said?

A. There was not anything said except to pay the charges and get the receipt.

By the COURT:

Q. Let me understand that. A man ships a horse at Albany and he comes to Philadelphia to get a receipt for the horse, does he? Were you at Albany?

A. I was at—I signed the receipt for the charges.

Q. At Albany?

A. No, at Cynwyd, a receipt for the delivery of the traps, and collected the total amount of the freight charges.

Mr. SELLERS: This horse was sent C. O. D. and he collected the freight charges at Cynwyd; he collected from this man $26.

The COURT: He made no bargain with him; he had instructions from the Albany end what he was to collect, had he not?

The WITNESS: That was the instructions.

By Mr. SELLERS:

Q. What was that twenty-six dollars that was paid you for——

Mr. SHIELDS: What was said?

Q. This money was paid to you?

103 By the COURT:

Q. Was anything said between you two people on that occasion?
A. Mr. Grady didn't pay the money personally, his man in charge paid the money.
Q. Mr. Wilkie?
A. Mr. Wilkie.
Q. Was anything said?
A. Nothing said.
Q. Now let us see exactly what happened between you two people.

By Mr. SELLERS:

Q. What happened?
A. There was not anything happened except signing the receipt, and accepting the traps, and paying the charges.
Q. Do you know whether Mr. Wilkie, when this horse was paid for, paid for anything in addition to the freight charges?

Mr. SHIELDS: That is objected to.

Q. Do you know whether there were any charges asked of Mr. Wilkie other than that of the freight charges by reason of any other expenses?

The COURT: You can ask him whether he is familiar with the terms of this contract, and if so, what they were.

Q. Do you know whether any other expenses than the freight charges were incurred, of your own knowledge, and if so, whether they were paid for by anybody?

104 The COURT: No.

Mr. SELLERS: Cannot I ask this man if in Cynwyd he asked for any additional charges for anything incurred at Cynwyd?
The COURT: Whatever was said between the two people he can testify to.

Q. Did you or did you not——

The COURT: What was said, and what was done, the whole conversation, he had no other business with Wilkie but one thing; what was said and what was done?
Mr. SELLERS: Cannot I ask him whether he imposed any additional charges on him?
The COURT: No, you cannot suggest things to him.
Mr. SELLERS: I now wish to ask the witness——
The COURT: Put your question.
Mr. SELLERS: The counsel for defendant desires to ask the witness whether any charge other than freight charges was imposed upon Mr. Wilkie or the owner of this horse?
Mr. SHIELDS: I do not object to it. Let him answer yes or no.

Q. Was there?
A. There was a seven dollar charge on the movement from Island Park to Albany, with switching charges.

Q. And was that item covered by the twenty-six dollars that was paid?

A. That was in with the $26.00.

Q. That was paid you?

105 A. That was paid.

By the COURT:

Q. What was in there? There was a seven dollar charge for what?

A. Seven dollar charge from the original point of shipment, Island Park to Albany, including switching charges.

Q. What may that be?

A. Switching from one railroad over to another.

Q. You mean there were charges in reference to something that happened before he was shipped?

A. From Albany to Cynwyd.

Q. You mean the rates you have testified are from Albany to Cynwyd?

A. The rate of forty-nine cents a hundred for four thousand pounds.

Q. From Albany to Cynwyd?

A. Yes, sir.

Q. But that there had been some transportation of this horse from another place than Albany, called Island Park, and the charges from Island Park to the point of departure from Albany——

A. Was seven dollars.

Q. Was seven dollars?

A. Seven dollars.

By Mr. SELLERS:

Q. Seven dollars, and twenty-six dollars was paid you?

A. Twenty-six dollars and sixty cents.

106 Q. $26.60 was paid, and the charges were how much?

A. That included seven dollars.

Q. How much did you say?

A. Seven dollars.

Q. That left $19.60 as the freight charges?

By the COURT:

Q. That is forty-nine cents a hundred?

A. At forty-nine cents a hundred for four thousand pounds.

Q. That you said was first class charges?

A. That was the charge, reduced rate charge.

By Mr. SELLERS:

Q. What all was in this shipment, the horse and what else?

A. It included a horse, harness, trunks, and what are called the traps, stable utensils.

Q. How much space did they occupy?

The COURT: I suppose you need not doubt that it is agreed that four thousand pounds is a fair basis of value.

Q. Was that the fact?
A. That was the fact.

By the COURT:

Q. And four thousand pounds is the usual basis of valuation for the shipment of a horse and traps?
A. And traps.

By Mr. SELLERS:

Q. And upon that the freight charges, you say, were $19.60?
107 A. $19.60.
Q. In accordance with the terms of this?
A. In accordance with the terms of the release.
Q. What would it have been if they had not been shipped by this contract, but in the usual manner?
A. Twenty per cent. higher than first class rates.

(No cross-examination)

Testimony closed.

WILLIAM HUGHES and BENJAMIN F. A. FLEMING, Trading as Hughes & Fleming, v. THE PENNSYLVANIA RAILROAD CO. | No. 39. C. P. No. 2, S., 1900.

PHILADELPHIA, *May 8th*, 1901.

Charge of SULZBERGER, *J.*

GENTLEMEN OF THE JURY: The plaintiffs, Hughes and Fleming, seek to recover from the Pennsylvania Railroad Company the sum of ten thousand dollars, being the value of a horse Montauk owned by them, which they shipped from Albany, New York, on August 10th, 1900, to be delivered at Cynwyd, Montgomery county,
108 Pennsylvania. The horse was shipped, went upon the cars at Weehawken, New Jersey, and thence on the road to its final destination, was halted in the Pennsylvania Company's yard at Fifty-second street where the accident happened. The primary questions involved are did the defendants carry the horse safely according to contract or were they guilty of negligence that produced the injury? You have heard the evidence upon that point, and from it you are to decide whether the company was guilty of negligence. Then the question of value arises. You have heard the evidence of value, and you have heard the comments upon the evidence of value by the counsel for the defendant. As a guide to you in the determination of the question I want to say that the remarks that have been made in this case upon the subject of its being a horse case, and that are frequently made in similar cases, are not to be taken by you as reflections upon the people who have testified, but as criticisms of the whole character of testimony that is based on opinion. A good deal of popular jesting is allowed in talking about

horse cases as a class, but in reality the true criticism is that wherever individual opinion rules there is a large field for capricious judgment. A valuable horse is something like a valuable picture or a valuable work of art. For the common mass of mankind a horse is worth one, two or three hundred dollars for the ordinary purposes of draft. A horse relieves man from the duty of pulling himself or his goods.

That kind of horse has what we call an easily ascertainable
109 market value. When you leave that class of goods that are needed for the actual necessities of all mankind you leave the safe rule of the value of the market. The market value is that value originally which is assigned to goods in the place where all men needing the goods congregate for the purpose of buying them. There is nothing more general than a market of the people, who are within its range, come there to buy, and in general the things sold there are things of ordinary and common use. By a sort of metaphore we apply "market value" to goods that do not ordinarily come into a literal market, namely, goods that are bought and sold by a relatively few among the mass of mankind. But you perceive at once that the certainty of opinion which is produced by multiplying transactions indefinitely, transactions in the same kind of goods at the same time and in the same place, that certainty which is produced by the standards thus established, is very much impaired when you are dealing with things that are so rare as to be in their nature individual, and moreover with things that are purchasable only by relativeiy very few people. Of course there is room for a wide difference of opinion there. You have heard the evidence of the plaintiffs' witnesses. Their estimates vary from ten thousand dollars to a sum considerably in excess of it. There are no witnesses for the defendant to qualify that judgment, but there is in you, with the cross-examination that has been furnished, the power to modify according to your judgments the
110 evidence of the witnesses by what has been said by themselves in the cross-examination. That is, it has been said by the plaintiffs themselves that within sixty days before this accident happened they paid about six thousand dollars for the horse, and spent some money on it. That is an item which you may well consider in determining its value, but if it is only an item it is not a controlling item. If their view be correct that afterwards they had such a test of the qualities of the horse which showed that the horse had qualities superior to those which had become apparent by the public record at Point Breeze, and that a disclosure of those qualities to the ordinary buyer would have satisfied him that the true value of the horse was in excess of that paid on the day the record was made at Point Breeze, that you are to take into consideration. I shall say no more to you on that point. Those two facts you are to ascertain.

I am asked by the defendant, however, to charge you, that even if you ascertain the injury to be due to the negligence of the defendant, and the value to be a considerable sum, yet nevertheless the plaintiff cannot here recover in a sum greater than one hundred dollars. That is a question of law upon which you are not en-

titled to have any other opinion that the one that I give you. The theory upon which the defendant asks the court to limit you to one hundred dollars is this: That upon the 10th of August, 1900, when the horse was shipped at Albany, a bill of lading was given to the shipper by the New York Central and
111 Hudson River Railroad Company, the lessee of the West Shore railroad which runs from Albany to Weehawken, and that at the same time when the bill of lading was given the shipper signed another paper, called "a live stock contract," which paper was executed only in single copy which was left with the railroad company. This live stock contract contains in it a printed clause which values horses and mules at a price not exceeding one hundred dollars each, and also says that beyond this valuation neither the said carrier, that is the New York Central & Hudson River Railroad Company, nor any connecting carrier, shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier, or connecting carriers, or their employés, or otherwise. It appears that according to the law of New York such a contract may lawfully be made, and for the purposes of this case I charge you that according to the law of Pennsylvania such a contract could not be made by a Pennsylvania corporation in the State of Pennsylvania for carriage over a railroad of the State of Pennsylvania. The true question here is not whether citizens have a right to contract, because as a general rule the right of contract is sacred. There are, however, limitations upon the right of contract. There is a certain field of human activity over which the State assumes supreme control by virtue of its sovereignty, and when the State declares its policy, which we call public policy, upon those questions, then the right of private contract is utterly abol-
112 ished to that extent. According to the policy of the State of Pennsylvania no one who operates a railroad on its public roads can in any way, directly or indirectly, protect himself against his own negligence, and this upon the theory that the rights of the State of Pennsylvania over its own roads are absolutely sovereign. If the proposition be correct that the State of Pennsylvania by virtue of its sovereignty refuses to permit a carrier on its public roads to excuse himself, or limit himself, or protect himself against his own negligence by contracts made in the State of Pennsylvania, it is perfectly obvious that it will still less permit people outside of the State to make contracts by which the sovereignty of the State of Pennsylvania shall be interfered with. That which may not be done by the roads of the State of Pennsylvania cannot be done by any device. No man may go away from here and agree to violate the public policy of Pennsylvania, and no man who has never been here may outside of the State contract to violate the public policy of Pennsylvania within the State. Therefore so far as these papers constitute a contract by anybody at any time or any place made and entered into contemplating a violation of the public policy of Pennsylvania upon its own highways, such contract is absolutely null and void to that effect. I therefore charge you that there is no

limitation of one hundred dollars upon the amount that you shall ascertain as damages, and I decline to charge you as requested in the first and second points of the defendant.

Exception noted for defendant to the refusal to affirm the two points presented in behalf of the defendant, and to such part of the general charge as bears upon the subject matter treated in
113 those points.

Counsel for defendant, before the jury leave the box, requests the court to direct that the charge be reduced to writing and filed of record.

Defendant's Points.

I. That it was lawful in the State of New York for the carrier to limit its liability by a special contract for an injury resulting from its negligence; that said contract having been for a through consignment from Albany to Cynwyd, a place within this State, said contract must be considered in its entirety and is incapable of divisibility; that said contract having stipulated for an agreed valuation of the stock shipped, the parties must be governed by its terms throughout the entire route, as said contract must be interpreted and enforced here by the law of the place where it was made, and within which State it was partly performed; and that, consequently, the plaintiff is not entitled to recover in excess of the valuation agreed upon by the parties at the time of shipment.

II. That the plaintiff is not entitled to recover in execss of $100.

114 *Bill of Exceptions.*

And thereupon the counsel for the said defendant did then and there except as follows:—

I. To the refusal of the learned judge to affirm the two points presented in behalf of the defendant and to such part of the general charge as heard upon the subject matter treated in those points, and inasmuch as the subject matter of said exceptions does not appear upon the record, the said counsel for the said defendant did then and there tender this bill of exceptions to the opinion of the said court, and requested that the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge did put his seal to this bill of exceptions, pursuant to the aforesaid statute, this twenty-eighth day of May, 1901.

(Signed) MAYER SULZBERGER. [L. S.]

Endorsement: No. 39 September term, 1900. C. P. No. 2 William Hughes and Benjamin F. A. Fleming, trading as Hughes and Fleming *v.* Pennsylvania Railroad Company. Bill of exceptions Presented May 14, 1901. Filed May 29, 1901. P. H. White, pro. proth'y. This bill of exceptions may be marked presented and sealed by the learned trial judge. Shields for pl't'fs. David W. Sellers for def't. May 13, 1901.

115 EASTERN DISTRICT OF PENNSYLVANIA, } ss:
City and County of Philadelphia, }

[SEAL.] The Commonwealth of Pennsylvania to the justices of the court of common pleas No. 2 for the county of Philadelphia, Greeting:

We being willing for certain causes, to be certified of the matter of appeal of the Pennsylvania Railroad Company from the judgment in No. 39 September term 1900, wherein William Hughes and Benjamin F. A. Fleming, trading as Hughes and Fleming were plaintiffs and the said appellant was defendant, before you, or some of you, depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the justices of our supreme court of Pennsylvania, at a supreme court to be holden at Philadelphia, in and for the eastern district, the first Monday of January next so full and entire as in our court before you they remain, you certify and send, together with this writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable J. Brewster McCollum, chief justice
116 of our said supreme court, at Philadelphia, the 24th day of June in the year of our Lord one thousand nine hundred and one.

CHAS. S. GREENE,
Prothonotary.

To the honorable the judges of the supreme court of the Commonwealth of Pennsylvania, sitting in and for the eastern district:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify, and send, as within we are commanded.

(Signed) MAYER SULZBERGER. [L. S.]

Endorsement: No. 39 Sept. term 1900. C. P. No. 2. No. 239 January term 1901. Supreme court. William Hughes *et al.*, trading etc., *v.* Pennsylvania Railroad Company, appellant. Certiorari to the court of common pleas No. 2 for the county of Philadelphia. Returnable the first Monday of January 1902. Rule on the appellee, to appear and plead on the return-day of the writ. Brought into office June 24, 1901 Jas. W. Fletcher, dep. proth'y Filed Nov. 22, 22, 1901 In supreme court. David W. Sellers.

117 *Assignments of Error.*

In the Supreme Court of Pennsylvania for the Eastern District, of January Term, 1901.

WILLIAM HUGHES and BENJAMIN F. A. FLEMING, Trading as Hughes and Fleming, Plaintiffs Below and Now Appellees,
v.
THE PENNSYLVANIA RAILROAD COMPANY, Defendant Below and Now Appellant.
} No. 239.

Assignments of error.

1. The learned trial judge erred in declining to charge:

"That it was lawful in the State of New York for the carrier to limit its liability by a special contract for an injury resulting from its negligence; that said contract having been for a through consignment from Albany to Cynwyd, a place within this State, said contract must be considered in its entirety and is incapable of divisibility; that said contract having stipulated for an agreed valuation of the stock shipped, the parties must be governed by its terms throughout the entire route, as said contract must be interpreted and enforced here by the law of the place where it was made, and
118 within which State it was partly performed; and that, consequently, the plaintiff is not entitled to recover in excess of the valuation agreed upon by the parties at the time of shipment."

II. That the learned trial judge erred in declining to charge:

"That the plaintiff is not entitled to recover in excess of $100."

III. The learned court below erred in entering judgment in conflict with the act of Congress of Feb. 4, 1887, entitled "An act to regulate commerce." Section one of said act clearly provides that where the transportation is from one State to another, under a through bill of lading, that its provisions shall be carried out, unless it be in conflict with a statute of the State in which it may be performed or in conflict with the policy of the United States as laid down in the Federal courts, and that, as the contract was valid in the place where made, and as there is no statute in Pennsylvania prohibitory of an agreed valuation to establish a rate, and, as it is consistent with the policy of the United States as declared by the Federal courts, the judgment should have been for the valuation mentioned in the contract.

(Signed) DAVID W. SELLERS,
Attorney for Appellant.

Endorsement: 239. Jan. term, 1901. S. C. of Pa., E. Dist. Hughes & Fleming, appellees, *v.* P. R. R. Co., appellant. Assignments
119 of error. Filed Nov. 18, 1901 In supreme court. David W. Sellers, John G. Johnson, for appellant.

Opinion.

In the Supreme Court of Pennsylvania.

WILLIAM HUGHES and BENJAMIN F. A. Fleming, Trading as Hughes & Fleming, v. THE PENNSYLVANIA RAILROAD COMPANY, Appellant.	No. 239, January Term, 1901. Appeal from the Judgment of the Court of Common Pleas No. 2 of Philadelphia County.

POTTER, *J.*:

The plaintiffs in this case were the owners of a valuable horse which was shipped by their agent from Albany, New York, to Cynwyd, Pennsylvania.

The contract for transportation was made in Albany, with the New York Central railroad, acting for itself and connecting carriers. The bill of lading provided that "no carrier shall be liable for loss or damage not occurring on its own road, or its portion of the through route." The horse was carried safely by the initial carrier to the end of its line, and delivered to the defendant company, by whom it was brought to Philadelphia; at this point the horse was badly injured by the negligence of defendant's servants, and the injuries thus received are the foundation of this action.

The defendant admitted liability, but claimed that the plaintiff was not entitled to recover in excess of one hundred dollars. In support of this claim, it relied upon a printed form of a shipping contract, which was signed by plaintiff's agent at the time of shipment, and retained by the carrier. This contract contained a stipulation that the liability of the initial carrier and any connecting carrier should be limited in case of loss or damage to a horse or mule, whether through negligence or otherwise, to an amount not exceeding one hundred dollars each.

At the trial, the court below declined to charge the jury that such a limitation of the amount of the damages was lawful in this case. The jury under the evidence found a verdict for ninety-nine hundred ($9900) dollars, the full value of the horse.

The refusal of the court to charge that the contract of shipment, limiting the liability for negligence, was valid, and binding upon the plaintiff, is here assigned as error.

It is conceded that this contract is valid under the law of New York, and that if the horse had been injured while in course of transportation through the State, the plaintiffs would have been limited to the sum of one hundred dollars.

It is also conceded that such a contract, made in Pennsylvania, for transportation, between points within the State, would be void, as against the settled policy of this State. The question is not an open one with us. Nor does it matter whether the attempt be to

limit the liability as in Ruppel *v.* Railroad, 167 Pa. 166, or to claim exemption entirely from liability, as in Willock *v.* Railroad, 166 Pa. 184.

But because the contract was made in New York, to be performed partly in New York, and partly in Pennsylvania, it is contended that the law of New York should govern the case.

It may be noted here, that while the contract contains an acknowledgement that Grady had the option to ship the horse at a higher rate, with increased liability, yet as a matter of fact, no such offer was made. The evidence shows that the freight agent at Albany did not know the amount of the charges, and the blanks for the amounts were not filled in.

The case of Burnett *v.* Railroad, 176 Pa. 45, seems to be decisive of the question now before us. In that case the plaintiff was an employee of defendant at Trenton, N. J. He applied for and obtained free transportation from Trenton to Elmira, N. Y. He received two passes, one from Trenton to Philadelphia, which was not in evidence, and the other, an employé's trip pass, from Phila-
122 delphia to Elmira, by the terms of which he assumed all risks of accident. He was injured at Harrisburg, Pa. through the admitted negligence of defendant's employees. It was proved at the trial that under the laws of New Jersey the contract by which the plaintiff in consideration of free transportation, assumed the risk of accident, was valid and in that State he could not recover; and it was conceded by the defendant that in Pennsylvania the decisions are otherwise, and that such a contract will not relieve a common carrier from responsibility for negligence. There, as in this case, the contract was valid in the State where made. The transportation was safely performed into this State, and the injury occurred within this State through the negligence of the carrier. It was held that the responsibility of the defendant was to be determined by the law of the State were the contract was being performed, and where the negligence occurred; and recovery was allowed. In the present case, the facts are more strongly against the defendant, in that it is not the initial carrier under the contract, and the stipulation upon the part of each carrier was against liability for damages not occurring on its portion of the through route.

In Fairchild *v.* Pennsylvania R. R. Co., 148 Pa. 527, there was a contract for the transportation of a horse, from Washington, D. C., through Pennsylvania to Harkimus, New Jersey. It was injured by the negligence of the defendant, while in Baltimore, Maryland. The contract contained a stipulation limiting the value of
123 the horse to $100. Suit was brought to recover damages for the injury. The court below held the contract to be valid, and under instructions, a verdict was rendered for $105.50, and judgment entered thereon. This judgment was affirmed, this court saying, in a *per curiam*, "This written contract was made in the District of Columbia, and is to be interpreted by the *lex loci contractus*." Forepaugh *v.* R. R. Co., 128 Pa. 217.

If, however, in the performance of the contract, the horse had

been carried into Pennsylvania, and it had been injured in this State, the principle set forth in Burnett *v.* Railroad, *supra* would no doubt have been applied and the limitation of liability held void. In the Fairchild case, nothing is said about the law of Maryland where the injury occurred, though as a matter of fact the limitation of liability was valid in that State as appears in Brehme *v.* Express Co., 25 Md. 328. The Fairchild case when properly understood is authority only for the proposition, that a contract containing a limitation of liability, made to a State where it is valid, will be enforced in this State, when an injury occurs in the course of transportation through a State where such a contract is not contrary to public policy.

It is only an application of the doctrine of Forepaugh *v.* Railroad, 128 Pa. 217, to a slightly differing state of facts. The reference to Hart *v.* Railroad, 112 U. S. 331, could only have been to show the law of the District of Columbia. For in Grogan *v.* Express Co., 114 Pa. 523, this court expressly refused to follow the Hart case.

124 A distinction may well be made, between contracts of a general nature, and those of common carriers of goods through several States. Much stress is laid in the brief of appellants, upon the opinion of Justice Bradley in Morgan *v.* N. O. M. & T. R. Co., 2 Woods 244. The contract in that case was made in New York to be performed in an important part there; and in part by the building of a railroad in Louisiana; another important part was to be performed in Alabama, and perhaps other important parts in other States. The court held that, where a contract is to be performed in several jurisdictions, there could be no presumption that the parties had in view the laws of each of these jurisdictions, as the law that was to govern the contract, and therefore held that it was governed by the law of New York where it was made.

But it will be noticed that the case did not involve the law of common carriers, but only a contract relating to a matter about which the parties were free to contract, and against which there was no public policy of any State. The inquiry was therefore properly confined to ascertaining the intention of the parties to the agreement.

But a contract for the carriage of goods is not one as to which parties are entirely free to contract. Judge Sulzberger in his charge in this case, aptly said: "There are however limitations upon the right of contract. There is a certain field of human activity

125 over which the State assumes supreme control by virtue of its sovereignty, and when the State declares its policy, which we call public policy, upon these questions, then the right of private contract is utterly abolished to that extent."

It will not do therefore to apply to the contracts of common carriers, all the principles that may apply to other contracts. When courts declare a contract void as against public policy, they are not declaring the intention of the parties, as in the ordinary case, but are acting under the obligation of the higher law, which requires the enforcement of that which is for the public good.

Where a contract containing a stipulation limiting liability for negligence, is made in one State, but with a view to its performance, by transportation through or into one or more other States, we see no reason why it should not be construed in accordance with the law of the State, where its negligent breach causing injury, occurs. If such a contract comes under construction, in a State like Pennsylvania whose policy prohibits such exemption, and the injury has occurred in a State where the contract is valid, the stipulation will be enforced, as in Forepaugh *v.* R. R. Co., and in Fairchild *v.* R. R. Co. But if the injury has taken place within its limits, it will declare the contract null and void, as in Burnett *v.* R. R. Co. In the Fairchild case, as the injury occurred in Maryland, this court enforced the law of that State; if the injury to the horse had
126 been delayed until in the course of the journey, it had reached Pennsylvania, our own law of public policy would have controlled.

This principle is maintained in Barter *v.* Wheeler, 49 N. H. 9. In that case, the transportation was from Toledo, Ohio, to Concord, N. H. The goods were lost on their passage through New York, and the court said that if it is to "be executed partially in New York, we perceive no reason why in respect to that part, the law of that State should not govern, and such is the doctrine laid down in Story on Contracts, sec. 655."

To the same effect is Pittsburgh R. R. Co. *v.* Sheppard, 56 Ohio 69. This principle involves no greater difficulty as to proof, than the attempt to recover under a limitation of liability. In either case, negligence is a fact to be proven as to time and place, as any other fact.

Careful consideration of the contract and of the evidence shows that the contract in this case was not entire, either as to the obligation of the carrier to transport or of the shipper to pay the freight. The New York Central R. R. made no contract for itself beyond its own lines; it acted as agent only for the connecting carrier. It is the same as though each carrier had separately agreed to transport over its own lines. And the freight charges were shown to be made up of two distinct sums. One being the amount from Albany to Jersey City, and the other from Jersey City to Cynwyd. No case has come under notice, directly deciding that such a contract
127 is severable. But in Wells *v.* Thomas, 27 Mo. 17, the ruling is such as to indicate that in the opinion of the court, the bill of lading issued in that case covering lines of several carriers, was not an entire contract.

The third assignment of error suggests that the entry of judgment is in conflict with the interstate commerce act of Congress. This seems to be an afterthought, as there is no indication in the record that this question was raised or considered in the court below. It is not apparent how the act can have any application to this case. It contains nothing bearing upon the validity of a contract limiting the liability of a railroad for loss or injury caused by negligence. The object of the act seems to me to be to secure continuous carriage,

and uniform rates, and to compel the furnishing of equal facilities. We cannot see that the entry of judgment in this case interferes in any way with the legitimate exercise of interstate commerce:

Upon the case as a whole, there is nothing to show any bad faith upon the part of the shipper. He applied for the transportation of his horse upon a special car, and loaded him thereon, together with the traps and harness and a special attendant. There was no concealment, or any misrepresentation as to value. The shipper paid the carrier the amount asked of him. It does not appear that any bargain was made in advance, for a freight rate, nor was there any reason why the full rate, sufficient in the opinion of the car-
128 rier to cover the risk of transportation, should not have been charged and collected. The shipper should not be asked to pay for insurance against the negligence of the employee of the carrier. If protection of that nature was desired, the carrier was at liberty to procure it for itself, and at its own expense. It must be assumed also that both shipper and carrier knew the law of Pennsylvania, and had it in view when the contract was made. The facts were submitted to the jury in a charge which clearly and correctly stated the public policy of this State, with regard to the question under consideration.

The assignments of error are overruled, and the judgment is affirmed.

Mitchell and Brown, JJ., dissent.

Endorsement: No. 239 January term 1901. William Hughes and Benjamin F. A. Fleming, trading as Hughes and Fleming, *v.* The Pennsylvania Railroad Company, appellant. Filed Apr. 21, 1902. In supreme court. Appeal from the judgment of the court of common pleas No. 2 of Philadelphia county. Mitchell and Brown JJ. dissent. Judgment affirmed. Potter, J.

129 UNITED STATES OF AMERICA, } ss:
State of Pennsylvania, }

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, eastern district, do hereby certify that the foregoing record, pages 1 to 128 inclusive, is a true and faithful copy of the record and proceedings of the supreme court of the State of Pennsylvania, eastern district, in a certain suit therein pending wherein The Pennsylvania Railroad Company was appellant, and William Hughes and Benjamin F. A. Fleming, trading etc., were appellees.

Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said supreme court of the State of Pennsylvania, eastern district, at Philadelphia, the 17th day of

May, 1902, and in the one hundred and twenty-sixth year of the Independence of the United States.

CHAS. S. GREENE,
Prothonotary of the Supreme Court of Pennsylvania, Eastern District.

130 I, J. Brewster McCollum chief justice of the supreme court of Pennsylvania, do hereby certify, that Charles S. Greene was, at the time of signing the annexed attestation, and now is, prothonotary of the said supreme court of Pennsylvania, in and for the eastern district, to whose acts, as such, full faith and credit are and ought to be given; and that the said attestation is in due form.

In witness whereof, I have hereunto subscribed my name this seventeenth day of May one thousand nine hundred and two.

J. BREWSTER McCOLLUM.

I, Charles S. Greene, prothonotary of the supreme court of Pennsylvania, in and for the eastern district, do certify, that the honorable J. Brewster McCollum by whom the foregoing certificate was made and given, was, at the time of making and giving the same, and is now, chief justice of the supreme court of Pennsylvania; to whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; and that his signature, thereto subscribed, is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said supreme court of Pennsylvania, in and for the eastern district, at Philadelphia, this 17th day of May one thousand nine hundred and two.

[Seal of the Supreme Court of Pennsylvania, Eastern District, 1776.]

CHAS. S. GREENE.

131 In the Supreme Court of the United States.

In the Supreme Court of Pennsylvania, Eastern District.

WILLIAM HUGHES and BENJAMIN F. A. FLEMING, Trading as Hughes & Fleming, Appellees,
vs.
THE PENNSYLVANIA RAILROAD COMPANY, Appellant.

Specifications of error by appellant to the judgment of the court in affirming judgment of court of common pleas No. 2 for the county of Philadelphia.

1. The learned supreme court erred in entering judgment of affirmance of the judgment entered in the court of common pleas No. 2 for the county of Philadelphia, because the entry of such judgment was in conflict with the act of Congress of 4th February, 1887, entitled "An act to regulate commerce," and the supplements thereto.

2. The learned supreme court erred in affirming the judgment of said court of common pleas by holding as invalid and illegal a contract for inter-state transportation made in the State of New York in the course of inter-state commerce.

3. The learned supreme court erred in affirming the judgment of the court of common pleas No. 2 of Philadelphia county, because by said affirmance of judgment a law of the State of Pennsylvania affecting inter-state commerce was enforced with such effect as to invalidate a contract for inter-state transportation valid under the act of Congress of February 4th, 1887 entitled "An act to regulate commerce," and the supplements thereto.

4. The learned supreme court erred in affirming the judgment of the court of common pleas No. 2 of Philadelphia county, by
132 which a contract for inter-state commerce transportation made in the State of New York, valid under the laws of the United States, by which the liability of the inter-state carrier was limited to the amount of value of the goods carried, declared in the bill of lading, was declared invalid.

5. The learned supreme court erred in affirming the judgment of the court of common pleas No. 2 of Philadelphia county by which judgment an inter-state commerce contract, made in the State of New York, was held invalid although said contract was made for the purpose of inter-state commerce transportation and was valid under the laws of the United States.

6. The learned supreme court erred in not holding that the law of Pennsylvania was in violation of the act of Congress of February 4th, 1887 entitled "An act to regulate commerce," and the supplements thereto, to such extent as said law prevented inter-state carriers from making contracts valid under the laws of the United States.

7. The learned supreme court erred in affirming the action of the court of common pleas No. 2, of Philadelphia county in declining to charge as follows:

"That it was lawful in the State of New York for the carrier to limit its liability by a special contract for an injury resulting from its negligence; that said contract having been for a through consignment from Albany to Cynwyd, a place within this State, said contract must be considered in its entirety and is incapable of divisability; that said contract having stipulated for an agreed valuation of the stock shipped, the parties must be governed by its terms throughout the entire route, as said contract must be interpreted and enforced here by the law of the place where it
133 was made, and within which State it was partly performed; and that, consequently, the plaintiff is not entitled to recover in excess of the valuation agreed upon by the parties at the time of shipment."

8. The learned supreme court erred in affirming the action of the court of common pleas No. 2 of Philadelphia county, which court had declined to charge as requested by appellant in these words:—

"That the plaintiff is not entitled to recover in excess of $100."

9. The learned supreme court erred in holding that it was not within the power of the appellant, an inter-state commerce carrier, under a through bill of lading for the transportation of a horse from a point in the State of New York to a point in the State of Pennsylvania, to carry under a liability limited to the valuation declared by the shipper where said carrier was willing to carry under an unlimited liability upon payment of a higher but reasonable rate of transfer.

SELLERS & RHOADS,
JOHN G. JOHNSON,
For Appellants.

134 [Endorsed:] 239. Jan. term, 1901. S. C. E. D. Appeal of the P. R. R. Co. from the judgment made in the case in which William Hughes and Benj. F. A. Fleming, trading as Hughes and Fleming, were plaintiffs and the above named appellant was defendant. Specifications of error. (In the Supreme Court of the United States.) Sellers & Rhoads, John G. Johnson, for appellant.

Endorsed on cover: File No. 18,542. Pennsylvania supreme court. Term No. 56. The Pennsylvania Railroad Company, plaintiff in error, *vs.* William Hughes & Benjamin F. A. Fleming, trading as Hughes & Fleming. Filed May 26th, 1902.

FILE COPY

No. 58. Of October Term, 1903.

Office Supreme Court U.S.
FILED
OCT 19 1903
JAMES H. McKENNEY, Clerk.

IN THE

Supreme Court of the United States.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

William Hughes and Benjamin F. A. Fleming, trading as Hughes & Fleming, Defendants in Error.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

[Record No. 18,542.]

BRIEF FOR PLAINTIFF IN ERROR.

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JOHN G. JOHNSON,
For Plaintiff in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

William Hughes and Benjamin F. A. Fleming, trading as Hughes & Fleming, Defendants in Error.

October Term, 1903.

No. 56.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Hughes & Fleming, the defendants in error, brought suit in the Court of Common Pleas, No. 2, of Philadelphia County, for injuries to a horse shipped from Albany, N. Y., to Cynwyd, in the State of Pennsylvania, under a through bill of lading (Record, page 47) issued by the New York Central and Hudson River Railroad Company, a common carrier of the State of New York, at Albany, on the tenth day of August, 1900. This bill of lading expressed that the shipper had delivered to the carrier one horse, the consignee being one Thomas Grady, of Cynwyd, Pa., for transportation to destination, "if on the said carrier's line of "railroad, otherwise to the place where said live stock is

"to be received by the connecting carriers for transpor-"tation to or toward destination, and that the same has "been received by said carrier for itself and on behalf of "connecting carriers, for transportation, subject to the "official tariffs, classifications and rules of the said com-"pany," and upon certain terms and conditions therein enumerated. The bill of lading named a through rate of fare and provided:—

> "Thomas Grady does hereby acknowledge that "he had the option of shipping the above-described "live stock at a higher rate of freight according to "the official tariffs, classifications and rules of the "said carrier and connecting carriers, and thereby "receiving the security of the liability of the said "carrier and connecting railroad and transportation "companies, as common carriers of the said live "stock, upon their respective roads and lines, but "has voluntarily decided to ship the same under "this contract at the reduced rate of freight above "first mentioned."

The agreement further provided:—

> "No carrier shall be liable for loss or damage not "occurring on its own road or its portion of the "through route, nor after said property is ready "for delivery to the next carrier or to consignee. "The amount of any loss or damage for which any "carrier becomes liable shall be computed at the "value of the property at the place and time of "shipment under this bill of lading, unless a lower "value has been agreed upon or is determined by "the classification upon which the rate is based, in "either of which events such lower value shall be the "maximum price to govern such computation."

It contained this further provision:—

> "That said shipper or the consignee is to pay "freight thereon to the said carrier at the rate of "_____ per _____ which is the lower "published tariff rate upon the express condition

"that the carrier assumes liability on the said live "stock to the extent only of the following agreed "valuation, upon which valuation is based the rate "charged for the transportation of the said animals, "and beyond which valuation neither the said car- "rier nor any connecting carrier shall be liable in "any event, whether the loss or damage occur "through the negligence of the said carrier or con- "necting carriers, or their employees or otherwise.

"If horses or mules—not exceeding one hundred "dollars each."

It was alleged that the horse thus carried at a low rate upon an agreed valuation of $100, was injured in the course of the transit in Pennsylvania, after it had arrived in that State and had been delivered to the plaintiff in error by the connecting carrier.

An action was brought against it to recover for the injuries thus occasioned. It was contended on the trial that the horse was possessed of enormous value because of occult fast virtues. It was impossible to present testimony in contradiction. A verdict of $9000 was rendered.

The learned trial judge negatived points to the effect that (1) the contract being valid in the State of New York was enforceable in Pennsylvania, inasmuch as the contract provided for a through transportation; and (2) that the plaintiff had no legal right to recover in excess of $100; and he charged, *inter alia*, as follows (Record, page 59):—

"I charge you that according to the law of Penn- "sylvania such a contract could not be made by a "Pennsylvania corporation in the State of Penn- "sylvania for carriage over a railroad of the State "of Pennsylvania. The true question here is not "whether citizens have a right to contract, because "as a general rule the right of contract is sacred. "There are, however, limitations upon the right of "contract. There is a certain field of human ac- "tivity over which the State assumes supreme con- "trol by virtue of its sovereignity, and when the "State declares its policy, which we call public policy,

"upon those questions, then the right of private "contract is utterly abolished to that extent. Ac- "cording to the policy of the State of Pennsylvania "no one who operates a railroad on its public roads "can in any way, directly or indirectly, protect "himself against his own negligence, and this upon "the theory that the rights of the State of Pennsyl- "vania over its own roads are absolutely sovereign. "If the proposition be correct that the State of "Pennsylvania by virtue of its sovereignty refuses "to permit a carrier on its public roads to excuse "himself, or limit himself, or protect himself against "his own negligence by contracts made in the State "of Pennsylvania, it is perfectly obvious that it will "still less permit people outside of the State to make "contracts by which the sovereignty of the State "of Pennsylvania shall be interfered with. That "which may not be done by the roads of the State "of Pennsylvania cannot be done by any device. "No man may go away from here and agree to vio- "late the public policy of Pennsylvania, and no man "who has never been here may outside of the State "contract to violate the public policy of Pennsyl- "vania within the State. Therefore so far as these "papers constitute a contract by anybody at any "time or any place made and entered into contem- "plating a violation of the public policy of Pennsyl- "vania upon its own highways, such contract is "absolutely null and void to that effect. I there- "fore charge you that there is no limitation of one "hundred dollars upon the amount that you shall "ascertain as damages."

An appeal was taken to the Supreme Court of the State and error was assigned to the learned trial judge's refusal of the points submitted to him. An additional assignment was made claiming that judgment had been entered in conflict with the Interstate Commerce Act. (Record, page 62.)

The appeal was dismissed. The learned justice who delivered the opinion of the appellate court said, *inter alia* (Record, page 66):—

"Where a contract containing a stipulation limiting liability for negligence is made in one State, "but with a view to its performance by transportation through or into one or more other States, "we see no reason why it should not be construed "in accordance with the law of the State, where its "negligent breach causing injury, occurs. If such "a contract comes under construction, in a State "like Pennsylvania whose policy prohibits such "exemption, and the injury has occurred in a State "where the contract is valid, the stipulation will be "enforced. But if the injury has taken place within "its limits, it will declare the contract null and void."

He further said:—

"The third assignment of error suggests that the "entry of judgment is in conflict with the interstate "commerce act of Congress. This seems to be an "afterthought, as there is no indication in the record "that this question was raised or considered in the "court below. It is not apparent how the act can "have any application to this case. It contains "nothing bearing upon the validity of a contract "limiting the liability of a railroad for loss or injury "caused by negligence. The object of the act seems "to me to be to secure continuous carriage, and uniform rates, and to compel the furnishing of equal "facilities. We cannot see that the entry of judgment in this case interferes in any way with the "legitimate exercise of interstate commerce."

A writ of error was taken to this court from the judgment of affirmance thus entered by the Supreme Court of Pennsylvania.

SPECIFICATIONS OF ERROR RELIED UPON.

The specifications of error are to be found on page 68 of the Record. They allege error in the Supreme Court of the State of Pennsylvania in entering its judgment af-

firming that entered by the Court of Common Pleas, No. 2, of Philadelphia County, because the law enforced by said judgment is a regulation of commerce and is violative of the Interstate Commerce Act of 1887, inasmuch as it made effectual an alleged public policy of the State of Pennsylvania which declared illegal a contract for interstate commerce transportation where the shipper, in consideration of a reduced rate, agreed, in case of the carrier's negligence, that a stipulated valuation alone should be recovered. All the assignments of error are therefore relied upon because all are directed to said points.

BRIEF OF ARGUMENT.

One of the connecting carriers under a bill of lading which provided for an interstate through transportation, made in the State of New York where the decisions sustained its validity, has been made responsible to the extent of $9000 for negligence in transporting a horse, although a reduced rate of freight had been charged in consideration of the agreement that in case of loss no greater valuation than $100 could be recovered.

An interstate commerce contract, valid in New York, where it was made, and valid, as this court has repeatedly decided, everywhere in the United States, has been set aside by the courts of Pennsylvania because held by them as illegal and violative of the public policy of that State.

In the statement of the case we have given citations from the charge of the trial judge and from the opinion of the learned justice who spoke for the Supreme Court of Pennsylvania, putting the refusal to enforce this contract upon a supposed public policy of Pennsylvania.

The inevitable result of this decision will be to compel the shipper, in the future, to pay a higher rate of freight when horses are transported. No carrier will transport them at a reduced rate if deprived of all consideration for such reduced rate.

I. THE COMMON LAW OF THE UNITED STATES AS INTERPRETED BY THIS COURT, PERMITS CARRIERS, IN THE COURSE OF INTERSTATE COMMERCE, IN CONSIDERATION OF MAKING A REDUCED RATE, TO LIMIT THEIR LIABILITY TO A DESIGNATED VALUATION.

II. A CONTRACT FOR AN INTERSTATE TRANSPORTATION, ESPECIALLY ONE VALID WHERE MADE, IS NOT SUBJECT TO INCONSISTENT PUBLIC POLICIES NOR TO ANY OTHER PUBLIC POLICY THAN THAT OF THE UNITED STATES.

III. A STATE LAW OR STATE POLICY WHICH INTERFERES WITH OR REGULATES INTERSTATE COMMERCE IS VOID BECAUSE IT IS EXCLUSIVELY WITHIN THE POWER OF CONGRESS TO REGULATE SUCH COMMERCE AND SUCH POWER HAS BEEN EXERCISED BY THE INTERSTATE COMMERCE ACT OF 1887.

IV. THE FEDERAL QUESTION INVOLVED IN THIS APPEAL IS PROPERLY RAISED UPON THE RECORD.

I. The common law of the United States as interterpreted by this court, permits carriers, in the course of interstate commerce, in consideration of making a reduced rate, to limit their liability to a designated valuation.

It is hardly necessary to establish this proposition by a citation to this court of its own decisions, some of which are very recent in date.

In Hart *vs.* P. R. R. Co., 112 U. S., 331, it was said by Mr. Justice Blatchford, in delivering the opinion of this court (page 336):—

> "It is contended for the plaintiff that the bill of "lading does not purport to limit the liability of the "defendant to the amounts stated in it, in the event "of loss through the negligence of the defendant. "But we are of opinion that the contract is not "susceptible of that construction. The defendant "receives the property for transportation, on the

"terms and conditions expressed, which the plaintiff "accepts as just and reasonable. The first paragraph "of the contract is that the plaintiff is to pay the rate "of freight expressed, 'on the condition that the car-"'rier assumes a liability on the stock to the extent of "'the following agreed valuation. If horses or mules, "'not exceeding $200 each. * * * If a chartered "'car, on the stock and contents in same, $1200 for "'the carload.' Then follow in the first paragraph "these words: 'But no carrier shall be liable for the "'acts of the animals themselves, or to each other, "'such as biting, kicking, goring, or smothering, nor "'for loss or damage arising from condition of the "'animals themselves, which risks, being beyond the "'control of the company, are hereby assumed by the "'owner, and the carrier released therefrom.' This "statement of the fact that the risk from the acts and "condition of the horses are risks beyond the control "of the defendant, and are, therefore, assumed by "the plaintiff, shows, if more were needed than the "other language of the contract, that the risks and "liability assumed by the defendant in the remainder "of the same paragraph are those not beyond, but "within, the control of the defendant, and, therefore, "apply to loss through the negligence of the de-"fendant.

"It must be presumed from the terms of the bill "of lading, and without any evidence on the subject "and especially in the absence of any evidence to "the contrary, that as the rate of freight expressed "is stated to be on the condition that the defendant "assumes a liability to the extent of the agreed "valuation named, the rate of freight is graduated "by the valuation. Especially is this so, as the "bill of lading is what its heading states it to be, 'a "'limited liability live-stock contract,' and is con-"fined to live stock. Although the horses, being "race horses, may, aside from the bill of lading, "have been of greater real value than that specified "in it, whatever passed between the parties before "the bill of lading was signed was merged in the "valuation it fixed; and it is not asserted that the "plaintiff named any value, greater or less, other-

"wise than as he assented to the value named in "the bill of lading, by signing it. The presumption "is conclusive that if the liability had been assumed "on a valuation as great as that now alleged, a "higher rate of freight would have been charged. "The rate of freight is indissolubly bound up with "the valuation. If the rate of freight named was "the only one offered by the defendant, it was be- "cause it was a rate measured by the valuation "expressed. If the valuation was fixed at that "expressed, when the real value was larger, it was "because the rate of freight named was measured "by the low valuation. The plaintiff cannot claim "a higher valuation on the agreed rate of freight.

"It is further contended by the plaintiff that the "defendant was forbidden, by public policy, to fix "a limit for its liability for a loss by negligence at "an amount less than the actual loss by such neg- "ligence. As a minor proposition, a distinction is "sought to be drawn between a case where a shipper, "on requirement, states the value of the prop- "erty and a rate of freight is fixed accordingly, "and the present case. It is said that while in the "former case the shipper may be confined to the "value he so fixed, in the event of a loss by negligence, "the same rule does not apply to a case where the "valuation inserted in the contract is not a valuation "previously named by the shipper. But we see no "sound reason for this distinction. The valuation "named was the 'agreed valuation,' the one on "which the minds of the parties met, however it "came to be fixed, and the rate of freight was based "on that valuation, and was fixed on condition that "such was the valuation, and that the liability "should go to that extent, and no further.

"We are therefore, brought back to the main "question. It is the law of this court that a com- "mon carrier may, by special contract, limit his "common-law liability; but that he cannot stipulate "for exemption from the consequences of his own "negligence or that of his servants. New Jersey "Steam Nav. Co. *vs.* Merchants' Bank, 6 How., "344; York Co. *vs.* Central R. R. Co., 3 Wall., 107;

"Railroad Co. *vs.* Lockwood, 17 Wall., 357; Express "Co. *vs.* Caldwell, 21 Wall., 264; Railroad Co. *vs.* "Pratt, 22 Wall., 123; Bank of Kentucky *vs.* Adams "Express Co., 93 U. S., 174; Railway Co. *vs.* Stevens, "95 U. S., 655.

"In York Co. *vs.* Central Railroad, 3 Wall., 107, "a contract was upheld exempting a carrier from "liability for loss by fire, the fire not having occurred "through any want of due care on his part. The "court said that a common carrier may 'prescribe "'regulations to protect himself against imposition "'and fraud, and fix a rate of charges proportionate "'to the magnitude of the risks he may have to "'encounter.'

"In Railroad Co. *vs.* Lockwood, 17 Wall., 357, the "following propositions were laid down by this "court: (1) A common carrier cannot lawfully "stipulate for exemption from responsibility when "such exemption is not just and reasonable in the "eye of the law; (2) it is not just and reasonable, "in the eye of the law, for a common carrier to "stipulate for exemption from responsibility for the "negligence of himself or his servants; (3) these rules "apply both to carriers of goods and to carriers of "passengers for hire, and with special force to the "latter. The basis of the decision was that the "exemption was to have applied to it the test of its "justness and reasonable character. It was said "that the contracts of the carrier 'must rest upon "'their fairness and reasonableness,' and that it "was just and reasonable that carriers should not be "responsible for losses happening by sheer accident, or "chargeable for valuable articles liable to be dam-"aged, unless apprised of their character or value. "That case was one of a drover traveling on a stock "train on a railroad, to look after his cattle, and "having a free pass for that purpose, who had signed "an agreement taking all risk of injury to his cattle "and of personal injury to himself, and who was "injured by the negligence of the railroad company "or its servants.

"In Express Co. *vs.* Caldwell, 21 Wall., 264, this "court held, that an agreement made by an express

"company, a common carrier in the habit of carry-
"ing small packages, that it should not be held
"liable for any loss or damage to a package delivered
"to it, unless claim should be made therefor within
"ninety days from its delivery to the company, was
"an agreement which the company could rightfully
"make. The court said: 'It is now the settled
"'law, that the responsibility of a common carrier
"'may be limited by an express agreement made
"'with his employer at the time of his accepting
"'goods for transportation, provided the limitation
"'be such as the law can recognize as reasonable and
"'not inconsistent with sound public policy.' It
"was held that the stipulation as to the time of
"making a claim was reasonable and intrinsically
"just, and could not be regarded as a stipulation for
"exemption from responsibility for negligence, be-
"cause it did not relieve the carrier from any obli-
"gation to exercise diligence, fidelity, and care.

"On the other hand, in Bank of Kentucky *vs.*
"Adams Express Co., 93 U. S., 174, it was held that
"a stipulation by an express company that it should
"not be liable for loss by fire could not be reason-
"ably construed as exempting it from liability for
"loss by fire occurring through the negligence of a
"railroad company which it had employed as a
"carrier.

"To the views announced in these cases we adhere.
"But there is not in them any adjudication on the
"particular question now before us. It may, how-
"ever, be disposed of on principles which are well
"established, and which do not conflict with any
"of the rulings of this court. As a general rule,
"and in the absence of fraud or imposition, a com-
"mon carrier is answerable for the loss of a pack-
"age of goods though he is ignorant of its contents,
"and though its contents are ever so valuable, if
"he does not make a special acceptance. This is
"reasonable, because he can always guard himself
"by a special acceptance, or by insisting on being
"informed of the nature and value of the articles
"before receiving them. If the shipper is guilty of
"fraud or imposition, by misrepresenting the nature

"or value of the articles, he destroys his claim to "indemnity, because he has attempted to deprive "the carrier of the right to be compensated in pro- "portion to the value of the articles and the conse- "quent risk assumed, and what he has done has "tended to lessen the vigilance the carrier would "otherwise have bestowed. 2 Kent's Comm., 603, "and cases cited; Relf *vs.* Rapp, 3 Watts and Ser- "geant, 21; Dunlap *vs.* International Steamboat Co., "98 Mass., 371; Railroad *vs.* Fraloff, 100 U. S., 24. "This qualification of the liabilty of the carrier is "reasonable, and is as important as the rule which "it qualifies. There is no justice in allowing the "shipper to be paid a large value for an article which "he had induced the carrier to take at a low rate of "freight on the assertion and agreement that its "value is a less sum than that claimed after a loss. "It is just to hold the shipper to his agreement, "fairly made, as to value, even where the loss or "injury has occurred through the negligence of the "carrier. The effect of the agreement is to cheapen "the freight and secure the carriage, if there is no "loss; and the effect of disregarding the agreement, "after a loss, is to expose the carrier to a greater "risk than the parties intended he should assume. "The agreement as to value, in this case, stands as "if the carrier had asked the value of the horses, "and had been told by the plaintiff the sum inserted "in the contract.

"The limitation as to value has no tendency to "exempt from liability for negligence. It does not "induce want of care. It exacts from the carrier "the measure of care due to the value agreed on. "The carrier is bound to respond in that value for "negligence. The compensation for carriage is based "on that value. The shipper is estopped from say- "ing that the value is greater. The articles have "no greater value, for the purposes of the contract "of transportation, between the parties to that con- "tract. The carrier must respond for negligence up "to that value. It is just and reasonable that such "a contract, fairly entered into, and where there is "no deceit practiced on the shipper, should be up-

"held. There is no violation of public policy. On "the contrary, it would be unjust and unreasonable, "and would be repugnant to the soundest principles "of fair dealing and of the freedom of contracting, "and thus in conflict with public policy, if a shipper "should be allowed to reap the benefit of the con- "tract if there is no loss, and to repudiate it in case "of loss.

"This principle is not a new one. In Gibbon *vs.* "Paynton, 4 Burrows, 2298, the sum of £100 was "hidden in some hay in an old mail bag and sent by "a coach and lost. The plaintiff knew of a notice "by the proprietor that he would not be answerable "for money unless he knew what it was, but did not "apprise the proprietor that there was money in the "bag. The defense was upheld, Lord MANSFIELD "saying: 'A common carrier, in respect of the "'premium he is to receive runs the risk of the goods, "'and must make good the loss, though it happen "'without any fault in him, the reward making him "'answerable for their safe delivery. His warranty "'and insurance is in respect of the reward he is to "'receive, and the reward ought to be proportionate "'to the risk. If he makes a greater warranty and "'insurance, he will take greater care, use more cau- "'tion, and be at the expense of more guards or "'other methods of security; and, therefore, he ought, "'in reason and justice, to have a greater reward.' "To the same effect is Batson *vs.* Donovan, 4 B. "& A, 21.

"The subject matter of the contract may be valued, "or the damages in case of a breach may be liqui- "dated in advance. In the present case the plaintiff "accepted the valuation as 'just and reasonable.' "The bill of lading did not contain a valuation of all "animals at a fixed sum for each, but a graduated "valuation according to the nature of the animal. "It does not appear that an unreasonable price would "have been charged for a higher valuation.

"The decisions in this country are at variance. "The rule which we regard as the proper one in the "case at bar is supported in Newburger *vs.* Howard, "6 Philadelphia Rep., 174; Squire *vs.* New York

"Central R. R. Co., 98 Mass., 239; Hopkins *vs.* West-
"cott, 6 Blatchford, 64; Belger *vs.* Dinsmore, 51
"N. Y., 166; Oppenheimer *vs.* United States Express
"Co., 69 Ill., 62; Magnin *vs.* Dinsmore, 56 N. Y.,
"168, and 62 *Id.*, 35, and 70 *Id.*, 410; Earnest *vs.*
"Express Co., 1 Woods, 573; Elkins *vs.* Empire
"Transportation Co., 81* Penn. St., 315; South &
"North Ala. R. R. Co. *vs.* Henlein, 52 Ala., 606;
"Same *vs.* Same, 56 *Id.*, 368; Muser *vs.* Holland,
"17 Blatchford, 412; Harvey *vs.* Terre Haute R. R.
"Co., 74 Missouri, 528; and Graves *vs.* Lake Shore
"Ry. Co., 137 Mass., 33. The contrary rule is sus-
"tained in Southern Express Co. *vs.* Moon, 39 Miss.,
"822; the City of Norwich, 4 Ben., 271; United States
"Express Co. *vs.* Backman, 28 Ohio St., 144; Black *vs.*
"Goodrich Transportation Co., 55 Wis., 319; Chicago,
"St. Louis & N. O. R. R. Co. *vs.* Abels, 60 Miss., 1017;
"Kansas City, &c., Railroad Co. *vs.* Simpson, 30
"Kansas, 645; and Moulton *vs.* St. Paul, &c., R. R.
"Co., 31 Minn., 85. We have given consideration
"to the views taken in these latter cases, but are
"unable to concur in their conclusions. Applying
"to the case in hand, the proper test to be applied
"to every limitation of the common-law liability
"of a carrier—its just and reasonable character—
"we have reached the result indicated. In Great
"Britain, a statute directs this test to be applied
"by the courts. The same rule is the proper one to
"be applied in this country, in the absence of any
"statutes.

"As relating to the question of the exemption of
"a carrier from liability beyond a declared value,
"reference may be made to section 4281 of the Re-
"vised Statutes of the United States (a re-enactment
"of section 69 of the Act of February 28, 1871, chapter
"100, 16 Stat., 458), which provides that if any
"shipper of certain enumerated articles, which are
"generally articles of large value in small bulk, 'shall
"'lade the same, as freight or baggage, on any vessel,
"'without at the time of such lading giving to the
"'master, clerk, agent, or owner of such vessel re-
"'ceiving the same a written notice of the true char-
"'acter and value thereof, and having the same en-

"'tered on the bill of lading therefor, the master and "'owner of such vessel shall not be liable as carriers "'thereof in any form or manner, nor shall any such "'master or owner be liable for any such goods beyond "'the value and according to the character thereof "'so notified and entered.' The principle of this "statute is in harmony with the decision at which we "have arrived.

"The plaintiff did not, in the course of the trial, "or by any request to instruct the jury, or by any "exception to the charge, raise the point that he "did not fully understand the terms of the bill of "lading, or that he was induced to sign it by any "fraud or under any misapprehension. On the con- "trary, he offered and read in evidence the bill of "lading as evidence of the contract on which he sued.

"The distinct ground of our decision in the case "at bar is, that where a contract of the kind, signed "by the shipper, is fairly made, agreeing on the val- "uation of the property carried, with the rate of "freight based on the condition that the carrier "assumes liability only to the extent of the agreed "valuation, even in case of loss or damage by the "negligence of the carrier, the contract will be up- "held as a proper and lawful mode of securing a due "proportion between the amount for which the car- "rier may be responsible and the freight he receives, "and of protecting himself against extravagant and "fanciful valuations. Squire *vs.* New York Central "R. R. Co., 98 Mass., 239, 245, and cases there cited."

The doctrine of this case is sustained by the later decisions of Phœnix Insurance Company *vs.* Erie & Western Transportation Company, 117 U. S., 312; Liverpool Steam Co. *vs.* Phœnix Insurance Company, 129 U. S., 397; New York, &c., R. R. Co. *vs.* Estill, 147 U. S., 591; Primrose *vs.* Western Union Telegraph, 154 U. S., 1; Chicago, Milwaukee, &c., Railway Company *vs.* Solan, 169 U. S., 133; Calderon *vs.* Atlas Steamship Company, 170 U. S., 272; and Queen of the Pacific, 180 U. S., 49.

In reaching its conclusion, this court interpreted the common law of the United States as the same exists in every State, including the State of Pennsylvania.

The common law which governs, is that stated by Mr. Justice Brewer in Western Union Tel. Co., *vs.* Call Pub. Co., 181 U. S., 101, in these words:—

> "Properly understood, no exceptions can be taken "to declarations of this kind. There is no body of "Federal common law separate and distinct from "the common law existing in the several States in the "sense that there is a body of statute law enacted by "Congress separate and distinct from the body of "statute law enacted by the several States. But it is "an entirely different thing to hold that there is no "common law in force generally throughout the "United States, and that the countless multitude of "interstate commercial transactions are subject to no "rules and burdened by no restrictions other than "those expressed in the statutes of Congress."

The same learned justice, in the course of his opinion, referring to a decision by District Justice Shiras, says (page 103):—

> "In it is collated a number of extracts from opin-"ions of this court, all tending to show the recogni-"tion of a general common law existing throughout "the United States, not, it is true, as a body of law "distinct from the common law enforced in the "States, but as containing the general rules and "principles by which all transactions are controlled, "except so far as those rules and principles are set "aside by express statute. It would serve no good "purpose to here repeat those quotations; it is enough "to refer to the opinion in which they are collated."

II. A contract for an interstate transportation, especially one valid where made, is not subject to inconsistent public policies nor to any other public policy than that of the United States.

The judgment of the Supreme Court of Pennsylvania is anomalous in that it establishes, as a legal principle, that a contract for interstate transportation, made by a carrier

of the State of New York, valid in the State where made, is illegal because of a public policy, supposed to exist in the State of Pennsylvania, although interstate commerce is within the exclusive jurisdiction of the Federal Government, and this court has determined that there is no such public policy.

If the judgment stands, therefore, a valid interstate commerce contract will be avoided because of a public policy which does not exist.

It would be difficult to maintain the proposition that an interstate commerce contract, valid where made, can be avoided by the courts of a State through which the commerce will pass or into which it will be delivered because of any public policy of such State, even though the public policy supposed to exist in Pennsylvania did exist, and even though the question of policy involved was not one concerning a transaction exclusively within the jurisdiction of the Federal Government.

In the Supreme Court of Pennsylvania the plaintiff in error argued, apart from the Federal question, that the contract was valid because valid in the place where made, because of its being performable partly within that State.

In that court, it thus argued:—

> "The only reason why the law of the place of contract does not always govern is, that different intention may be supposed to exist, where the entire performance is to be elsewhere; but, where no room is allowed for such inference, because of the performance being in several places, the law of the place must govern.
>
> "In the present case, the shipper presented himself to the New York Central Railroad Company's officials at Albany and demanded transportation of his horse, at a through rate, upon an entire contract, to a point near Philadelphia. The company had two rates for such transportation, one, the smaller, where a stipulated valuation was inserted in the bill of lading, and the other, the higher, where the horse was to be carried without any specification as to its value. The carrier was not

"bound to give the shipper the benefit of the reduced "rate, unless he agreed to such specification. He "preferred to become his own insurer and to take the "chance involved in the carriage at the reduced rate.

"For valuable consideration, he entered into a "bargain, valid where made, which governed the "entire shipment. Why should not this court en- "force his contract, thus made upon an adequate "consideration? How can he claim that the carrier "is liable beyond the stipulated valuation when he "received the consideration for his agreement that "it should not be thus liable? A common carrier in "Pennsylvania, which stipulates against its own "negligence where the shipment is between two "points in that Commonwealth, gives to the shipper "no consideration where it says it will do something "because of his permitting it to exempt itself from "its own negligence, inasmuch as the exemption is "invalid and cannot be enforced. In the case now "before the court, however, the carrier was permitted "at the place of contract, to guard against its own "negligence under the circumstances which then "existed. Consideration, therefore, resulted to the "shipper.

"The exact point involved in the present case "arose in Morgan *vs.* New Orleans M. & T. R. Co., "2 Woods, 244, also reported in 17 Federal Cases, "754. This case has been quoted approvingly by Mr. "Justice Gray, 129 U. S., 397, to which reference will "subsequently be made.

Mr. Justice Bradley, in the Morgan case, said:—

"I have no difficulty in saying that the convey- "ances and transfers to be made in pursuance of the "contract were to be made in conformity with the "laws of the States respectively in which the prop- "erty, when consisting of realty, or subject to local "law, was situated. And such conveyances and "transfers, when executed, would be governed by "the *lex rei sitae*. But that does not answer the "question as to what law the principal contract is "to be governed by. In Louisiana, non-perform-

"ance of a material stipulation renders the whole "contract liable to be dissolved. But no one would "apply that rule of Louisiana law to a contract not "subject to its dominion, even though the breach "should occur in Louisiana. The fact, therefore, that "one of the acts to be performed in this case—the "construction of the railroad—was to be performed "in Louisiana, will not help to resolve the question, "unless we can affirm that the entire contract is to "be governed by Louisiana law. Does the fact "that a portion of the contract must necessarily be "performed in Louisiana, subject it to that condition? "If that does, then the like fact that a portion of the "contract is necessarily to be performed in Alabama "would subject it to Alabama law, and make it an "Alabama contract. In this embarrassment I do "not know that I can do better than to fall back on "the general rule that a contract is to be governed "by the law of the place where it is made. The "presumption that where a contract is to be per-"formed in a different jurisdiction, the parties must "be intended to have in view the laws of the latter, "seems to be repelled when the performance is to "take place in several different jurisdictions. For "when there are two equal and opposite presump-"tions, neither of them can prevail. The present "case is still stronger, for much of the contract was "performable, and actually performed in the place "where it was made. I do not mean to say that "where the main and principal part of a contract is "to be performed in a State different from that in "which it is made, the presumption will not arise "that it is made in reference to the laws of such place "of performance, even though some minor and in-"cidental parts are required to be performed in still "different States. Such may very possibly be the "result in many instances that may occur. When "they happen they will be governed by the force of "their own circumstances. But I do not see that I "am called upon to apply any such exceptional rule "in this case. The building of the railroad in ques-"tion was a very important consideration, it is true; "but the contract embraced many other consider-

"ations equally important, that were not necessarily "to be performed in Louisiana.

"The conclusion, therefore, to which I am forced "to come is, that the principal contract, made on "the 12th of December, 1871, between the com- "plainant and the New Orleans, Mobile and Texas "Railroad Company, was a New York contract, "governed, as to its nature and obligation, by the "laws and jurisprudence of the State of New York; "and as by these laws and jurisprudence, so far as "appears, no such dissolving consequence follows "from a non-performance of part of the contract, "as is claimed in this case, the claim is untenable, "and the relief must be refused. As no relief can "be granted on either of the grounds laid in the bill "of complaint, the same must be dismissed with "costs."

In Liverpool Steam Co., *vs.* Phœnix Ins. Co., 129 U. S., 397, the syllabus reads:—

"A contract of affreightment, made in an American "port by an American shipper with an English "steamship company doing business there, for the "shipment of goods there and their carriage to and "delivery in England, where the freight is payable "in English currency, is an American contract, and "governed by American law, so far as regards the "effect of a stipulation exempting the company from "responsibility for the negligences of its servants "in the course of the voyage.

Mr. Justice Gray said (458):—

"This review of the principal cases demonstrates "that according to the great preponderance, if not "the uniform concurrence of authority, the general "rule, that the nature, the obligation and the inter- "pretation of a contract are to be governed by the "law of the place where it is made, unless the parties "at the time of making it have some other law in "view, requires a contract of affreightment made "in one country between citizens or residents thereof,

"and the performance of which begins there, to be "governed by the law of that country, unless the "parties, when entering into the contract, clearly "manifest a mutual intention that it shall be gov- "erned by the law of some other country.

"There does not appear to us to be anything in "either of the bills of lading in the present case, "tending to show that the contracting parties "looked to the law of England, or to any other law "than that of the place where the contract was "made."

He further said (459):—

"The contract being made at New York, the ship "owner having a place of business there, and the "shipper being an American, both parties must be "presumed to have submitted themselves to the law "there prevailing, and to have agreed to its action "upon their contract. The contract is a single one, "and its principal object, the transportation of the "goods, is one continuous act, to begin in the Port "of New York, to be chiefly performed on the high "seas, and to end at the Port of Liverpool. The "facts that the goods are to be delivered at Liver- "pool, and the freight and primage, therefore, pay- "able there in sterling currency, do not make the "contract an English contract, or refer to the Eng- "lish law the question of the liability of the carrier "for the negligence of the master and crew in the "course of the voyage. Peninsular & Oriental Co. "*vs.* Shand, Lloyd *vs.* Guibert, and Chartered Bank "of India *vs.* Netherlands Steam Navigation Co. "before cited."

He further stated (461):—

"Our conclusion on the principal question in the "case may be summed up thus: Each of the bills "of lading is an American and not an English con- "tract, and, so far as concerns the obligation to "carry the goods in safety, is to be governed by the "American law, and not by the law, municipal or

"maritime, of any other country. By our law, as "declared by this court, the stipulation by which "the appellant undertook to exempt itself from lia- "bility for the negligence of its servants is contrary "to public policy, and therefore void; and the loss "of the goods was a breach of the contract, for which "the shipper might maintain a suit against the car- "rier. This being so, the fact that the place where "the vessel went ashore, in consequence of the neg- "ligence of the master and officers in the prosecu- "tion of the voyage, was upon the coast of Great "Britain, is quite immaterial."

In the course of the decision there is a citation from Hale *vs.* New Jersey Steam Navigation Co., 15 Conn., 538, said case being thus reported by this court (455):—

"Goods were shipped at New York for Providence, "in Rhode Island, or Boston, in Massachusetts, on "a steamboat employed in the business of trans- "portation between New York and Providence; and "an exemption, claimed by the carrier under a pub- "lic notice, was disallowed by the Supreme Court "of Connecticut, because by the then law of New "York the liability of a common carrier could not "be limited by such a notice. Chief Justice Will- "iams, delivering judgment, said, 'The question is, "'by what law is this contract to be governed?' The "rule upon that subject is well settled, and has been "often recognized by this court, that contracts are "to be construed according to the laws of the State "where made, unless it is presumed from their tenor "that they were entered into with a view to the "laws of some other State. There is nothing in this "case, either from the location of the parties or the "nature of the contract, which shows that they could "have had any other law in view than that of the "place where it was made. Indeed, as the goods "were shipped to be transported to Boston or Prov- "idence, there would be the most entire uncertainty "what was to be the law of the case if any other "rule was to prevail. We have, therefore, no doubt "that the law of New York, as to the duties and

"obligations of common carriers, is to be the law of "the case."

The plaintiff in error's contention was not accepted as sound by the Supreme Court of Pennsylvania. In this court we urge additionally, that a contract for a transportation to be performed connectedly, in several States, valid in the place where made, and in accordance with the public policy which governs interstate transportation, is enforceable everywhere.

In the court below, the learned trial judge struck down the contract for a reason reiterated by the Supreme Court, thus expressed (Record, page 59):—

> "It is perfectly obvious that it [the State of Penn-"sylvania] will still less permit people outside of the "State to make contracts by which the sovereignty "of the State of Pennsylvania shall be interfered "with. * * * No man may go away from here "and agree to violate the public policy of Pennsyl-"vania and no man who has never been here may "outside of the State contract to violate the public "policy of Pennsylvania within the State. There-"fore so far as these papers constitute a contract "by anybody at any time or any place made and "entered into contemplating a violation of the public "policy of Pennsylvania upon its own highways, "such contract is absolutely null and void to that "effect."

We submit that it is entirely competent for any person to enter into a contract concerning interstate commerce, which is valid under the laws and public policy of the United States, and that the public policy of Pennsylvania, if any exists, and this court has held that none such does exist, must necessarily yield. It is not within the power of the Legislature, or of the courts of Pennsylvania, to stigmatize as illegal and to destroy a valid contract of interstate commerce. Whether such contract is or is not valid, is determinable by the laws of the United States, and all inconsistent laws of the States through which such commerce is conducted, are null.

In fact, there is no public policy such as was supposed to exist by the learned trial judge. This court, whose decision of the question is final, has so held.

We therefore present a case in which the courts of Pennsylvania have refused to enforce contracts exclusively within the jurisdiction of the Federal laws, and which, under such laws, are valid. If, therefore, a public policy in any State interferes with interstate commerce it must yield to the superior rights of those interested in the latter. Though such public policy may control commerce within the State, it is utterly inefficacious as regards commerce between the States.

The bill of lading in the present case was an entire contract stipulating for an entire transportation from one State to another, though performable at different points by different connecting carriers. It could not be held valid in one part and invalid in another, inasmuch as one consideration was paid for the whole service. The shipper received in New York, for the transportation through New York, a benefit which, under the laws of New York, resulted from the contract. This consideration sustained the contract in all its parts. An entire contract is not subject to several inconsistent public policies.

III. A State law or State policy which interferes with or regulates interstate commerce, is void because it is exclusively within the power of Congress to regulate such commerce and such power has been exercised by the Interstate Commerce Act of 1887.

It is hardly necessary to do more than state a proposition which will be universally accepted, viz., that the power in Congress to regulate interstate commerce is exclusive. No power exists in the States to regulate or interfere with the same. Until the power is exercised, interstate commerce is free from all restraints saving those imposed by the common law of the United States. Such common law is at all times subject to change by Congress. The Interstate Commerce Act of 1887 has introduced certain changes, and the rights and duties of interstate commerce are now

determined by the common law of the United States as modified by said enactment.

It is hardly necessary to sustain by argument the proposition that any law of the State which forbids the enforcement of a valid contract concerning interstate commerce interferes with and regulates such commerce.

The law of the United States leaves carriers and shippers free to make such contracts for interstate transportation as were made in the present case. By means of such a contract, the shipper is enabled to carry at a less rate of charge, and the carrier is exposed to less liability. It goes without saying that if the contract cannot be enforced by the carrier, it will not be made. The refusal to enforce is equivalent to a prohibition to make. The shipper will thus be deprived of an advantage which he might otherwise obtain. The unlimited right to contract is practically circumscribed.

It is immaterial in what form the State attempts thus to interfere, whether by an Act passed before the Interstate Commerce Act, or thereafter, or by its so-called common law, or by its so-called public policy. The interference with the contract comes from the law-making power of the State, and such interference is not within that power. If there is any public policy of Pennsylvania which condemns the contract, it cannot be one found in the common law of the United States. This court has so said. It must be the result of something peculiar to the law of Pennsylvania.

The purpose of the Interstate Commerce Act was to compel the exaction of reasonable rates; to bring about shipments connectedly and continuously from one State to another; to bring about by agreements between the carriers the establishment of joint rates; to compel the publication of such joint rates for through traffic; and to prohibit departures from the rates as published.

We will endeavor to illustrate this general statement by quotations from the Act of 1887. (24 Stats., U. S. 379.)

It provides that its provisions—

"Shall apply to any common carrier or carriers "engaged in the transportation of passengers or

"property wholly by railroad, or partly by railroad
"and partly by water when both are used, under a
"common control, management or arrangement
"for a continuous carriage or shipment from one
"State or Territory in the United States, &c., to
"any other State or Territory, &c."

It further provides (page 380):—

"Every common carrier subject to the provisions
"of this Act shall, according to their respective
"powers, afford all reasonable, proper and equal
"facilities for the interchange of traffic between
"their respective lines, and for the receiving, forward-
"ing and delivering of passengers and property to
"and from their several lines and those connecting
"therewith, and shall not discriminate in their rates
"and charges between such connecting lines."

The sixth section of the Act as amended in 1889 (25 Stats. U. S., 855), requires that every common carrier subject to its provisions—

"Shall print and keep open to public inspection
"schedules showing the rates and fares and charges
"for the transportation of passengers and property
"which any such common carrier has established
"and which are in force at the time upon its route.
"The schedules printed as aforesaid by any such
"common carrier shall plainly state the places upon
"its railroad between which property and passen-
"gers will be carried, and shall contain the classi-
"fication of freight in force, and shall also state sepa-
"rately the terminal charges and any rules or regu-
"lations which in anywise change, affect or determine
"any part or the aggregate of such aforesaid rates
"and fares and charges. Such schedules shall be
"plainly printed in large type and copies for the use
"of the public shall be posted in two public and
"conspicuous places," &c.

The Act as amended as above further provides (page 856):—

"And in cases where passengers and freight pass "over continuous lines or routes operated by more "than one common carrier, and the several common "carriers operating such lines or routes establish "joint tariffs of rates or fares or charges for such "continuous lines or routes, copies of such joint "tariffs shall also, in like manner, be filed with said "Commission. Such joint rates, fares and charges "on such continuous lines so filed as aforesaid shall be "made public by such common carriers when di- "rected by said Commission, in so far as may, in the "judgment of the Commission, be deemed practi- "cable; and said Commission shall from time to time "prescribe the measure of publicity which shall be "given to such rates, fares and charges, or to such "part of them as it may deem it practicable for such "common carrier to publish, and the places in which "they shall be published.

"No advance shall be made in joint rates, fares "and charges shown upon joint tariffs, except after "ten days' notice to the Commission, which shall "plainly state the changes proposed to be made in "the schedule then in force, and the time when the "increased rates, fares or charges will go into effect. "No reduction shall be made in joint rates, fares "and charges, except after three days' notice, to be "given to the Commission as is above provided in "the case of an advance of joint rates. The Com- "mission may make public such proposed advances, "or such reductions, in such manner as may, in its "judgment, be deemed practicable, and may pre- "scribe from time to time the measure of publicity "which common carriers shall give to advances or "reductions in joint tariffs.

"It shall be unlawful for any common carrier, "party to any joint tariff, to charge, demand, col- "lect or receive from any person or persons a greater "or less compensation for the transportation of per- "sons or property, or for any services in connection "therewith, between any points as to which a joint

"rate, fare or charge is named thereon, than is speci-
"fied in the schedule filed with the Commission in
"force at the time.

"The Commission may determine and prescribe
"the form in which the schedules required by this
"section to be kept open to public inspection shall
"be prepared and arranged, and may change the
"form from time to time as shall be found expedient.

"If any such common carrier shall neglect or re-
"fuse to file or publish its schedules or tariffs of
"rates, fares and charges as provided in this sec-
"tion, or any part of the same, such common car-
"rier shall, in addition to other penalties herein
"prescribed, be subject to a writ of *mandamus*, to
"be issued by any Circuit Court of the United States
"in the judicial district wherein the principal office
"of said common carrier is situated, or wherein such
"offense may be committed, and if such common
"carrier be a foreign corporation in the judicial cir-
"cuit wherein such common carrier accepts traffic
"and has an agent to perform such service, to com-
"pel compliance with the aforesaid provisions of this
"section; and such writ shall issue in the name of
"the people of the United States, at the relation of
"the Commissioners appointed under provisions of
"this Act; and the failure to comply with its re-
"quirements shall be punishable as and for a con-
"tempt; and the said Commissioners, as complain-
"ants, may also apply, in any such Circuit Court of
"the United States, for a writ of injunction against
"such common carrier, to restrain such common car-
"rier from receiving or transporting property among
"the several States and Territories of the United
"States, or between the United States and adjacent
"foreign countries, or between ports of transship-
"ment and of entry and the several States and ter-
"ritories of the United States, as mentioned in the
"first section of this Act, until such common carrier
"shall have complied with the aforesaid provisions
"of this section of this Act."

By the seventh section of said Act it is provided (24 Stats. U. S., 382):—

"That it shall be unlawful for any common carrier "subject to the provisions of this Act to enter into "any combination, contract or agreement, expressed "or implied, to prevent, by change of time schedule, "carriage in different cars, or by other means or "devices, the carriage of freights from being con- "tinuous from the place of shipment to the place "of destination; and no break of bulk, stoppage or "interruption made by such common carrier shall "prevent the carriage of freights from being and "being treated as one continuous carriage from the "place of shipment to the place of destination, un- "less such break, stoppage or interruption was made "in good faith for some necessary purpose, and with- "out any intent to avoid or unnecessarily interrupt "such continuous carriage or to evade any of the "provisions of this Act."

It will thus be seen, that under the regulations for interstate commerce which have been prescribed by Congress, it is the duty of each carrier, forming part of a line of interstate transportation, to afford all proper facilities for the interchange of traffic between the respective lines, for the receiving, forwarding and delivering the same to and from initial and terminal lines by means of a connecting line. Further, no common carrier forming part of a through line of interstate transportation can prevent a shipment being continuous. The connecting carrier is bound to receive freight which is delivered to it from an initial line destined to another State.

Under these circumstances, Congress has made it the right of any initial carrier to compel a connecting carrier to receive and forward, continuously, interstate commerce. The Act encourages carriers forming part of a through line to make joint rates. Such rates must be posted and published and must be maintained.

When, therefore, the shipper in the present case delivered his horse to the New York Central Railroad at Albany, he insisted upon what was his right, viz., that the initial carrier should receive it under a bill of lading providing for a through, interstate, continuous, transportation. The

initial carrier had the right, under the joint tariff established and published under the Act of Congress, to bind every carrier to do what was necessary to transport the horse, each receiving its share of the through rate.

Under the Interstate Commerce Act, the initial carrier is authorized to act for all connecting lines which have joined in establishing the published through rate freight rate, and to make a contract for transportation binding upon each of them, even though the liability of each will actually commence only with the delivery to it. In the present case, therefore, we have a contract in New York, legal under the laws thereof, by which the shipper agreed, with all the carriers concerned in the through transportation, that if they would name a reduced rate he would, in case of loss, demand only the valuation fixed as an equivalent of such reduction. Upon what principle of law or of honesty can the shipper be permitted to avail himself of the advantage which he thus acquired, by a contract with the carrier authorized to act for all, and be released from the consideration he agreed to allow?

The contract was not to transport over the Pennsylvania Railroad, but over the lines of various connecting carriers, one of which happened to be that company. Though part of the service contracted for was to be performed in New York, the other portion, part of a connected whole, was to be performed in Pennsylvania. The contract was valid according to the law of the place of contract and of performance, and was made in furtherance of the policy of an Act of Congress.

Interstate commerce, as regulated by the Act of 1887, is interfered with in many particulars by any prohibition imposed by a State upon valid contracts concerning the same. The rates as published for through transportation must be followed and if *reasonable* can be enforced. Reasonable exemptions and restrictions are part of a contract of through transportation, enforceable by each of the parties thereto.

The restriction upon the right to contract, imposed by the law of Pennsylvania, necessarily increases the cost of shipping, and is therefore a direct restraint upon com-

merce. The carriers forming a through line, a part of which is located in Pennsylvania, if not permitted to fix a reduced rate to shippers desirous of obtaining the same and willing to specify a valuation of the goods to be carried because thereof, will in all cases charge the higher rates.

If the shipper desires to secure cheap transportation, and is willing to take the risk of injury to his property beyond a certain valuation, he is at liberty, under the law of the United States, to bargain therefor. If prevented from such bargaining, his ability to transport his merchandise from one State to another is interfered with and, we submit, improperly.

No State could prescribe to a common carrier engaged in interstate transportation its rates for such transportation. It can compel neither the raising nor the lowering of the same. It necessarily raises the rate of interstate carriage if it deprives the carrier and shipper of the ability to make bargains upon terms mutually satisfactory, which bring about a reduction of the cost of transportation.

In Hall *vs.* DeCuir, 95 U. S., 485, after the Supreme Court of Louisiana had decided that an Act of the General Assembly of that State required those engaged in the transportation of passengers among the States to give all persons traveling within that State upon vessels employed in such business equal rights and privileges in all parts of the vessel without distinction on account of race or color, and subjected to an action for damages the owner of such a vessel who excluded colored passengers on account of their color from the cabin set apart for the use of whites during the passage, the Supreme Court of the United States held that such Act, so far as it had such operation, was a regulation of interstate commerce and was to that extent unconstitutional and void.

Mr. Chief Justice Waite, in the course of the opinion, said (page 488):—

> "We think it may safely be said that State "legislation which seeks to impose a direct burden

"upon interstate commerce, or to interfere directly "with its freedom, does encroach upon the exclusive "power of Congress. The statute now under con- "sideration, in our opinion, occupies that position. "It does not act upon the business through the "local instruments to be employed after coming "within the State, but directly upon the business "as it comes into the State from without or goes "out from within. While it purports only to control "the carrier when engaged within the State, it must "necessarily influence his conduct to some extent "in the management of his business throughout his "entire voyage. His disposition of passengers taken "up and put down within the State, or taken up "within to be carried without, cannot but affect in "a greater or less degree those taken up without and "brought within, and sometimes those taken up and "put down without. A passenger in the cabin set "apart for the use of whites without the State must, "when the boat comes within, share the accom- "modations of that cabin with such colored persons "as may come on board afterwards, if the law is "enforced."

In Wabash, St. Louis & Pacific Railway *vs.* Illinois, 118 U. S., 557, 572, it was said, after quoting from Hall *vs.* DeCuir:—

"The applicability of this language to the case "now under consideration, of a continuous trans- "portation of goods from New York to Central "Illinois, or from the latter to New York, is obvious, "and it is not easy to see how any distinction can "be made. Whatever may be the instrumentalities "by which this transportation from the one point "to the other is affected, it is but one voyage, as "much so as that of the steamboat on the Mississippi "River. It is not the railroads themselves that are "regulated by this act of the Illinois Legislature so "much as the charge for transportation, and, in the "language just cited, if each one of the States "through whose territories these goods are trans- "ported can fix its own rules for prices, for modes

"of transit, for times and modes of delivery, and all "the other incidents of transportation to which the "word 'regulation' can be applied, it is readily seen "that the embarrassments upon interstate trans- "portation as an element of interstate commerce "might be too oppressive to be submitted to. 'It "'was,' in the language of the court cited above, "'to meet just such a case that the commerce "'clause of the Constitution was adopted.'

"It cannot be too strongly insisted upon that the "right of continuous transportation from one end of "the country to the other is essential in modern "times to that freedom of commerce from the "restraints which the State might choose to impose "upon it, that the commerce clause was intended to "secure. This clause, giving to Congress the power "to regulate commerce among the States and with "foreign nations, as this court has said before, was "among the most important of the subjects which "prompted the formation of the Constitution. Cook "*vs.* Pennsylvania, 97 U. S. 566, 574; Brown *vs.* "Maryland, 12 Wheat., 419, 446. And it would be "a very feeble and almost useless provision, but "poorly adapted to secure the entire freedom of "commerce among the States which was deemed "essential to a more perfect union by the framers of "the Constitution, if, at every stage of the trans- "portation of goods and chattels through the "country, the State within whose limits a part of "this transportation must be done could impose "regulations concerning the price, compensation or "taxation, or any other restrictive regulation inter- "fering with and seriously embarrassing this com- "merce.

"The argument on this subject can never be better "stated than it is by Chief Justice Marshall in Gib- "bons *vs.* Ogden, 9 Wheat., 1, 195–6. He there "demonstrates that commerce among the States, "like commerce with foreign nations, is neces- "sarily a commerce which crosses State lines and "extends into the States, and the power of Congress "to regulate it exists wherever that commerce is "found. Speaking of navigation as an element of

"commerce, which it is, only, as a means of trans-
"portation, now largely superseded by railroads, he
"says: 'The power of Congress, then, comprehends
"'navigation within the limits of every State in the
"'Union, so far as that navigation may be, in any
"'manner, "connected with commerce with foreign
"'"nations, or among the several States, or with
"'"the Indian tribes." It may, of consequence,
"'pass the jurisdictional line of New York and act
"'upon the very waters (the Hudson River) to which
"'the prohibition now under consideration applies.'
"So the same power may pass the line of the State
"of Illinois and act upon its restriction upon the
"right of transportation extending over several
"States, including that one.

"In the case of Telegraph Co. *vs.* Texas, 105 U. S.,
"460, 465, the court held that 'a telegraph company
"'occupies the same relation to commerce as a carrier
"'of messages that a railroad company does as a car-
"'rier of goods,' and that both companies are instru-
"ments of commerce, and their business is commerce
"itself. * * * In the case of Welton *vs.* Mis-
"souri, 91 U. S., 275, 280, it was said: 'It will not be
"'denied that that portion of commerce with foreign
"'countries and between the States which consists in
"'the transportation and exchange of commodities is
"'of national importance, and admits and requires
"'uniformity of regulation. The very object of in-
"'vesting this power in the general Government was
"'to insure this uniformity against discriminating
"'State legislation.' And in County of Mobile *vs.*
"Kimball, 102 U. S., 691, 702, the same idea is very
"clearly stated in the following language: 'Com-
"'merce with foreign countries and among the States,
"'strictly considered, consists in intercourse and
"'traffic, including in these terms navigation and
"'the transportation and transit of persons and prop-
"'erty, as well as the purchase, sale and exchange of
"'commodities. For the regulation of commerce, as
"'thus defined, there can be only one system of rules,
"'applicable alike to the whole country; and the au-
"'thority which can act for the whole country can
"'alone adopt such a system. Action upon it by

"'separate States is not, therefore, permissible. Lan-
"'guage affirming the exclusiveness of the grant of
"'power over commerce as thus defined may not be
"'inaccurate, when it would be so if applied to legis-
"'lation upon subjects which are merely auxiliary to
"'commerce.' * * * We must, therefore, hold
"that it is not, and never has been, the deliberate
"opinion of the majority of this court, that the
"statute of a State which attempts to regulate the
"fares and charges by railroad companies within its
"limits, for a transportation which constitutes a part
"of commerce among the States, is a valid law.

"Let us see precisely what is the degree of inter-
"ference with the transportation of property or per-
"sons from one State to another which this statute
"proposes. A citizen of New York has goods which
"he desires to have transported by the railroad com-
"panies from that city to the interior of the State of
"Illinois. A continuous line of rail over which a car
"loaded with these goods can be carried, and is car-
"ried habitually, connects the place of shipment with
"the place of delivery. He undertakes to make
"a contract with a person engaged in the carrying
"business at the end of this route from whence the
"goods are to start, and he is told by the carrier, 'I
"'am free to make a fair and reasonable contract for
"'this carriage to the line of the State of Illinois, but
"'when the car which carries these goods is to cross
"'the line of that State, pursuing at the same time
"'this continuous track, I am met by a law of Illinois
"'which forbids me to make a free contract concerning
"'this transportation within that State, and subjects
"'me to certain rules by which I am to be governed
"'as to the charges which the same railroad company
"'in Illinois may make or has made, with reference
"'to other persons and other places of delivery.' So
"that while that carrier might be willing to carry
"these goods from the city of New York to the city
"of Peoria at the rate of fifteen cents per hundred
"pounds, he is not permitted to do so because the
"Illinois railroad company has already charged at
"the rate of twenty-five cents per hundred pounds
"for carriage to Gilman, in Illinois, which is eighty-
"six miles shorter than the distance to Peoria.

"So also, in the present case, the owner of corn, "the principal product of the country, desiring to "transport it from Peoria, in Illinois, to New York, "finds a railroad company willing to do this at the "rate of fifteen cents per hundred pounds for a carload, "but is compelled to pay at the rate of twenty-five "cents per hundred pounds, because the railroad "company has received from a person residing at "Gilman twenty-five cents per hundred pounds for "the transportation of a carload of the same class of "freight over the same line of road from Gilman to "New York. This is the result of the statute of "Illinois, in its endeavor to prevent unjust discrim- "ination, as construed by the Supreme Court of that "State. The effect of it is, that whatever may be "the rate of transportation per mile charged by the "railroad company from Gilman to Sheldon, a dis- "tance of twenty-three miles, in which the loading "and unloading of the freight is the largest expense "incurred by the railroad company, the same rate "per mile must be charged from Peoria to the city "of New York.

"The obvious injustice of such a rule as this, which "railroad companies are by heavy penalties com- "pelled to conform to, in regard to commerce among "the States, when applied to transportation which "includes Illinois in a long line of carriage through "several States, shows the value of the constitu- "tional provision which confides the power of regu- "lating interstate commerce to the Congress of the "United States, whose enlarged view of the interests "of all the States, and of the railroads concerned, "better fits it to establish just and equitable rules.

"Of the justice or propriety of the principle which "lies at the foundation of the Illinois statute, it is "not the province of this court to speak. As re- "stricted to a transportation which begins and ends "within the limits of the State, it may be very just "and equitable, and it certainly is the province of "the State legislature to determine that question. "But when it is attempted to apply to transporta- "tion through an entire series of States a principle "of this kind, and each one of the States shall at-

"tempt to establish its own rates of transportation, "its own methods to prevent discrimination in rates, "or to permit it, the deleterious influence upon the "freedom of commerce among the States and upon "the transit of goods through those States cannot "be overestimated. That this species of regulation "is one which must be, if established at all, of a "general and national character, and cannot be safely "and wisely remitted to local rules and local regula- "tions, we think is clear from what has already "been said. And if it be a regulation of commerce, "as we think we have demonstrated it is, and as the "Illinois court concedes it to be, it must be of that "national character, and the regulation can only ap- "propriately exist by general rules and principles "which demand that it should be done by the Con- "gress of the United States under the commerce "clause of the Constitution."

The syllabus of C., C., C. & St. Louis Railway Company *vs.* Illinois, 177 U. S., 514 reads thus:—

"A State statute required all regular passenger "trains to stop a sufficient length of time at county "seats to receive and let off passengers with safety. "It appearing that the defendant company furnished "four regular passenger trains per day each way, "which were sufficient to accommodate all the local "and through business, and that all such trains "stopped at county seats, the Act was held to be "invalid as applied to an express train intended only "for through passengers from St. Louis to New "York.

"While railways are bound to provide primarily "and adequately for the accommodation of those "to whom they are directly tributary, they have "the legal right, after all these local conditions have "been met, to adopt special provisions for through "traffic, and legislative interference therewith is an "infringement upon the clause of the Constitution "which requires that commerce between the States "shall be free and unobstructed."

We have stated as a proposition which will not be disputed that a State statute, valid before an Act of Congress, must yield to the latter. In Kaukauna Co. *vs.* Green Bay, &c., Canal, 142 U. S., 254, it is held:—

> "Proceedings under a State statute enacted before the adoption of the fourteenth amendment which, if taken before its adoption, would not have violated the Constitution, may, when taken after its adoption, violate it, if prohibited by that amendment."

IV. The Federal question involved in this appeal is properly raised upon the record.

We argue this proposition, because of the contention made in the Supreme Court of Pennsylvania, by the defendant in error in these words:—

> "If the contention of the appellant is given its utmost weight by assuming that some of the provisions of the Interstate Commerce Act would be violated if this court should adhere to its previous decisions the appellant must nevertheless meet the difficulty that this suggested error is an afterthought. The point of law was not presented at the trial in the court below. Under such circumstances it is settled by abundant authority that this court will refuse to consider the assignment of error."

A point was presented, however, to the Court of Common Pleas, asking the judge to charge (Record, page 60):—

> "That the plaintiff is not entitled to recover in excess of $100."

The contract provided for a limited valuation of $100. The plaintiff contended it was invalid, because contrary to the law of Pennsylvania. The defendant maintained that

it was valid. If the law and public policy of Pennsylvania, alleged to exist, interfered with the Federal power to regulate commerce and violated the Act of 1887, passed in pursuance thereof, the defendant was entitled to enforcement of its contract. The point presented in the court below therefore raised the question of the validity of the contract. It could not have been held invalid if proper effect had been given to the paramount Federal law.

In the Supreme Court, the refusal of the points presented for charge to the trial judge was assigned as error (Record, page 62), and a further point was there presented in these words:—

> "III. The learned court below erred in entering "judgment in conflict with the Act of Congress of "February 4th, 1887, entitled 'An Act to regulate "'commerce.' Section 1 of said Act clearly pro- "vides that where the transportation is from one "State to another, under a through bill of lading, "its provisions shall be carried out, unless it be "in conflict with a statute of the State in which it "may be performed or in conflict with the policy "of the United States as laid down in the Federal "courts, and that, as the contract was valid in the "place where made, and, as there is no statute in "Pennsylvania prohibitory of an agreed valuation "to establish a rate, and, as it is consistent with "the policy of the United States as declared by the "Federal courts, the judgment should have been "for the valuation mentioned in the contract."

In dealing with the question of the applicability of the Federal power, Mr. Justice Potter, delivering the opinion of the Supreme Court of Pennsylvania, said (Record, page 66):—

> "The third assignment of error suggests that the "entry of judgment is in conflict with the Interstate "Commerce Act of Congress. This seems to be an "afterthought, as there is no indication in the record "that this question was raised or considered in the

"court below. It is not apparent how the Act can
"have any application to this case. It contains
"nothing bearing upon the validity of a contract
"limiting the liability of a railroad for loss or injury
"caused by negligence. The object of the Act seems
"to me to be to secure continuous carriage and uni-
"form rates, and to compel the furnishing of equal
"facilities. We cannot see that the entry of judg-
"ment in this case interferes in any way with the
"legitimate exercise of interstate commerce."

The Supreme Court of Pennsylvania did not refuse to consider the point because it had not been properly taken. On the contrary, it did consider it, and held that the Interstate Commerce Act had no application and did not prevent the enforcement of the supposed public policy, or law, of Pennsylvania.

Whilst we concede that if a point raising a Federal question is refused to be considered by the highest appellate court of the State, because of its finding that it was not properly raised in the lower court under its rules, this court may refuse to entertain an appeal, we submit that the present record discloses no refusal by the appellate tribunal to consider the Federal question for any such reason. On the contrary, the point was considered and was passed upon by the Supreme Court of Pennsylvania. It held that the Act of Congress did not interfere with the prohibition supposed to be imposed by the law of Pennsylvania, and that the limitation of liability to the specified valuation was illegal. It was impossible for it thus to hold if the Act of Congress and the Federal power over commerce governed the controversy.

It is probably a waste of time to refer this court to its own decisions upon the subject, but none the less we do so.

In Missouri, Kansas, &c., Ry. Co. *vs.* Elliott, 184 U. S., 533, it was said:—

"The proposition relied upon to secure the re-
"versal of the judgment below is that the State
"court erroneously allowed as an element of damage

"upon an injunction bond given in a court of the "United States the sum of alleged counsel fees for "procuring a dissolution of the injunction, and that "as such fees under the rule prevailing in the equity "courts of the United States are not properly allow-"able, therefore the State court denied an immunity "asserted in favor of the defendant below and aris-"ing from an authority exercised under the United "States.

"We are at the outset met by an objection that "there is no jurisdiction to review the judgment of "the Kansas City Court of Appeals. It is con-"tended on behalf of the defendant in error that "the Federal question relied upon was not raised "below, and therefore is not reviewable here.

"The general rule undoubtedly is, that those "Federal questions which are required to be specially "set up and claimed must be so distinctly asserted "below as to place it beyond question that the party "bringing the case here from the State court in-"tended to and did assert such a Federal right in "the State court. But it is equally true that even "although the allegations of Federal right made in "the State court were so general and ambiguous of "their character that they would not in and in "themselves necessitate the conclusion that a right "of a Federal nature was brought to the attention "of the State court, yet if the State court in deciding "the case has actually considered and determined a "Federal question, although arising on ambiguous "averments, then a Federal controversy having "been actually decided, the right of this court to "review obtains. Oxley Stave Co. *vs.* Butler, 166 "U. S., 648, 660. All that is essential is that the "Federal questions must be presented in the State "court in such a manner as to bring them to the "attention of that tribunal. Chicago &c. Ry. Co. "*vs.* Chicago, 166 U. S. 226. And of course, where "it is shown by the record that the State court con-"sidered and decided the Federal question, the "purpose of the statute is subserved. And so "controlling as to the existence of the Federal "question is the fact that it was actually considered

"and decided by the State court, that it has been
"held, although the general rule is that the raising
"of a Federal question in a petition for rehearing
"in the highest court of the State is too late, yet
"when a question is thus raised and it is actually
"considered and decided by the State court, the right
"to review exists. Mallett *vs.* North Carolina, 181
"U. S. 589, 592.

"Now, it plainly appears that the Kansas City Court
"of Appeals considered that there was presented
"to it for decision the question whether, in an action
"brought in a State court on an injunction bond
"given in a court of the United States, the State
"court was bound to apply to such a bond the rule
"prevailing in the courts of equity of the United
"States, viz., that attorneys' fees are not a proper
"element of damage. We say this is undoubted,
"since the opinion of the Kansas City Court of Ap-
"peals recites that such was the contention, and the
"court proceeded to consider and decide it. That
"this contention involved a claim of immunity
"under an authority exercised under the United
"States, reviewable in this court, we have recently
"decided in Tullock *vs.* Mulvane. True it is that the
"Kansas City Court of Appeals held, contrary to the
"rule announced in the Tullock case, that the State
"court was not bound to apply the rule of dam-
"ages prevailing in the courts of the United States,
"and in effect while so concluding decided that the
"claim that the bond should be enforced according to
"the rule prevailing in the courts of the United States,
"involved no Federal question. But the fact that
"the State court, whilst deciding the Federal ques-
"tion, erroneously held that it was not a Federal one,
"does not take the case out of the rule that where a
"Federal question has been decided below, jurisdic-
"tion exists to review. The result of the contrary
"doctrine would be this, that no case where the
"question of Federal right had been actually decided
"could be reviewed here if the State court, in passing
"upon the question, had also decided that it was
"non-Federal in its character. The assertion that
"a Federal right was not raised below is therefore
"without merit."

In Sully *vs.* American National Bank, 178 U. S., 298, it was said:—

> "In regard to the objection that even Carhart has "raised the question too late we think it is without "foundation. He raised it in the Supreme Court, "and that court decided it against him, not on the "ground that he had not raised it in the lower court, "but on its merits, and for the reason that in the "judgment of the Supreme Court the statute was a "valid and constitutional exercise of the legislative "powers of the State."

In Erie Railroad Co. *vs.* Purdy, 185 U. S., 153, it was said:—

> "So, if the highest court of the State, by its final "judgment, sustains the validity of a State enact- "ment drawn in question there as repugnant to the "Constitution, treaties or laws of the United States, "or denies a right, privilege or immunity specially "set up or claimed in that court for the first time "under the Constitution or any treaty, statute or "authority exercised under the United States, this "court could review that judgment, although no "Federal question was distinctly raised or insisted "upon in the trial court. * * *
>
> "We therefore cannot hold that the Court of Ap- "peals, by its final judgment, sustained the validity "under the Constitution of the United States of the "statute drawn in question by the defendant or that "it denied any right or immunity now claimed by it "under the Fourteenth Amendment; for that court "simply declined to consider any Federal question "except that made under the commerce clause of the "Federal Constitution, assigning as the reason there- "for that no point was made at the trial in respect of "any other clause of that instrument. In so holding, "the court followed the settled rule of practice in "that State. On that practice alone was based its "refusal to consider a Federal question not brought "to the attention of the trial court. Vose *vs.* Cock- "croft, 44 N. Y., 415; Delaney *vs.* Brett, 51 N. Y., 78.
>
> "Now, where a party—drawing in question in this

"court a State enactment as invalid under the Con-
"stitution of the United States, or asserting that the
"final judgment of the highest court of a State
"denied to him a right or immunity under the Con-
"stitution of the United States—did not raise such
"question or specially set up or claim such right or
"immunity in the trial court, this court cannot re-
"view such final judgment and hold that the State
"enactment was unconstitutional or that the right
"or immunity so claimed had been *denied* by the
"highest court of the State, if that court did nothing
"more than decline to pass upon the Federal ques-
"tion because not raised in the trial court as re-
"quired by the State practice. Spies *vs.* Illinois,
"123 U. S., 131, 181; Miller *vs.* Texas, 153 U. S., 535,
"538; Morrison *vs.* Watson, 154 U. S., 111, 115. Of
"course, if upon examining the record, this court had
"found a Federal question was properly raised, or
"that a Federal right or immunity was specially
"claimed, in the trial court, then our jurisdiction
"would not have been defeated by the mere failure of
"the highest court of the State to dispose of the
"question so raised or to pass upon the right or im-
"munity so claimed."

In Phila. Fire Association *vs.* New York, 119 U. S., 110, it was held:—

"A Pennsylvania fire insurance corporation began
"doing business in New York in 1872, and continued
"it afterwards till 1882, receiving from year to
"year certificates of authority from the proper offi-
"cer, under a statute of New York passed in 1853.
"Chapter 694 of the laws of New York, of 1865 as
"amended by c. 60 of the laws of 1875, provided
"that whenever the laws of any other State should
"require from a New York fire insurance company
"a greater license fee than the laws of New York
"should then require from the fire insurance com-
"panies of such other State, all such companies of
"such other State should pay in New York a license
"fee equal to that imposed by such other State on
"New York companies. In 1873, Pennsylvania

"passed a law requiring from every insurance com-
"pany of another State, as a prerequisite to a cer-
"tificate of authority, a yearly tax of 3 per cent. on
"the premiums received by it in Pennsylvania during
"the preceding year. In 1882, the insurance officer
"of New York required the Pennsylvania corpora-
"tion to pay, as a license fee, a tax of 3 per cent. on
"the premiums received by it in New York in 1881.
"In a suit against such corporation, in a court of
"New York, to recover such tax, it was set up as a
"defense, that the tax was unlawful, because the
"corporation was a 'person' within the 'jurisdiction'
"of New York, and the 'equal protection of the laws'
"had been denied to it, in violation of a clause in the
"Fourteenth Amendment to the Constitution of the
"United States. On a writ of error to review the
"judgment of the highest court of New York, over-
"ruling such defense: *Held*, that such clause had no
"application, because, the defendant, being a for-
"eign corporation, was not within the jurisdiction
"of New York, until admitted by the State on a
"compliance with the condition of admission im-
"posed, namely, the payment of the tax required as
"a license fee.

"The business carried on by the corporation in
"New York was not a transaction of commerce.

"The opinion of the highest court of New York,
"duly authenticated by the proper officer, and
"transmitted to this court, with the record, in
"compliance with the eighth Rule, was examined to
"aid in determining whether that court decided
"such Federal question against the defendant"

In the opinion of the court in this case, at page 115, it was said:—

"The defendant claims here the benefit of the
"Fourteenth Amendment, and a question has oc-
"curred as to whether the record presents that
"point for our review. There being no pleadings,
"the obvious place to look for the claim would be
"the agreed statement of facts. But all that is
"there said is, that the defendant insists that the

"statute is 'unconstitutional and void and not a "'legitimate exercise of legislative power.' The "question was considered, in both the Supreme "Court and the Court of Appeals, as to the validity "of the statute, under the Constitution of New "York, as being a law made to depend for its opera- "tion on the legislation of a foreign State, and thus "an illegitimate exercise of legislative power. This "contention is fairly within the words of the agreed "statement, and, if it depended wholly on that state- "ment to determine whether the record raises a "Federal question, some doubt might exist. But in "view of what was said in Murdock *vs.* Memphis, 20 "Wall., 590, 633, in Gross *vs.* United States Mortgage "Co., 108 U. S. 477, and in Adams County *vs.* Bur- "lington & Missouri Railroad Co., 112 U. S. 123, "we think that we are at liberty to look into the "opinion of the Court of Appeals, a copy of which, "duly authenticated by the proper officer, is trans- "mitted to us with the record, in compliance with our "eighth Rule, for the purpose of aiding in determin- "ing what was decided by that court. From that "opinion it appears that the court not only decided "against the defendant all the questions other than "Federal which were raised, including two under "the Constitution of New York, but also decided "against it the Federal question referred to. If "the court had decided in its favor any one of the "other questions which went to the whole cause of "action, there would have been no necessity for "considering the Federal question. But as it was, "the decision of that question became necessary to "the disposition of the case, and was fully con- "sidered, not *sua sponte*, but as a point presented "by the defendant.

"The provision of the Fourteenth Amendment, "which went into effect in July, 1868, is, that no "State shall 'deny to any person within its juris- "'diction the equal protection of the laws.' The "first question which arises is, whether this cor- "poration was a person within the jurisdiction of "the State of New York, with reference to the "subject of controversy and within the meaning of "the Amendment."

In Jacobi *vs.* Alabama, 187 U. S., 133, 136, it was said:—

"In Spies *vs.* Illinois, 123 U. S. 131, where objection "to the admission of a certain letter, because ob- "tained in violation of the Constitution of the United "States, was made in the Supreme Court of the "State for the first time, and that court declined to "consider the constitutional question supposed to "be involved on the ground that it was not raised "in the trial court, Mr. Chief Justice Waite said: "'To give us jurisdiction under section 709 of the "'Revised Statutes because of the denial by a State "'court of any title, right, privilege or immunity "'claimed under the Constitution, or any treaty or "'statute of the United States, it must appear on "'the record that such title, right, privilege or "'immunity was "specially set up or claimed" at "'the proper time in the proper way. To be re- "'viewable here the decision must be against the "'right so *set up or claimed*. As the Supreme Court "'of the State was reviewing the decision of the "'trial court, it must appear that the claim was "'made in that court, because the Supreme Court "'was only authorized to review the judgment for "'errors committed there, and we can do no more. "'This is not, as seems to be supposed by one of the "'counsel for the petitioners, a question of a waiver "'of a right under the Constitution, laws or treaties "'of the United States, but a question of claim. If "'the right was not set up or claimed in the proper "'court below, the judgment of the highest court "'of the State in the action is conclusive, so far as "'the right of review here is concerned.' And see "Brooks *vs.* Missouri, 124 U. S. 394; Baldwin *vs.* "Kansas, 129 U. S. 52."

In Home for Incurables *vs.* City of New York, 187 U. S., 155, 157, it was said:—

"The plaintiff insists here that the State court, "by its final judgment, refused to recognize cer- "tain rights belonging to it under the Constitution

"of the United States. But it does not appear on "the face of the record that he set up or claimed "any such right until the case reached this court. "In Parmelee *vs.* Lawrence, 11 Wall., 36, 38, this "court—following the previous cases of Lawley *vs.* "Walker, 14 How., 149, 152, and Railroad Com- "pany *vs.* Rock, 4 Wall., 177—said it was essential "to our jurisdiction in re-examining the judgment "of the State court that the alleged conflict between "the State law and the Constitution of the United "States 'appear in the pleadings of the suit, or from "'the evidence in the course of the trial, in the in- "'structions asked for, or from exceptions taken to "'the rulings of the court,' or 'it must be that such "'a question was necessarily involved in the decision, "'and that the State court would not have given "'a judgment without deciding it.' Later cases in "this court have expressed the additional thought "that if the highest court of the State assumes that "the record sufficiently presents a question of Fed- "eral right and decides against the party claiming "such right, we will look no further, and will proceed "to a consideration of that question, unless the de- "cision is made to rest, in part, upon some ground of "local law, sufficient enough in itself to sustain the "judgment, independently of any question of Fed- "eral right."

In Detroit, &c., Ry. *vs.* Osborn, 189 U. S., 383, 386, it was said:—

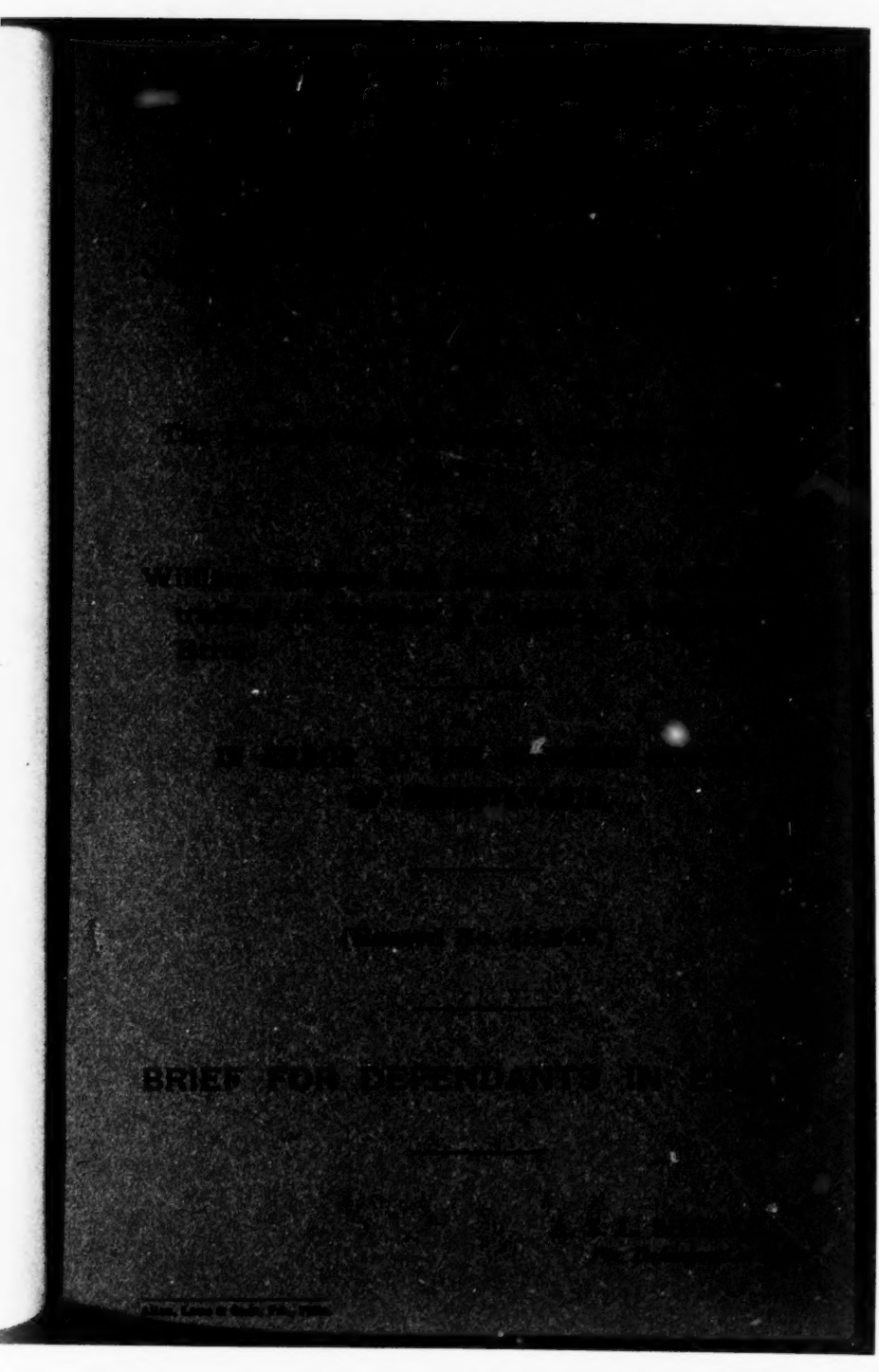
"A motion is made to dismiss the writ of error on "the ground that the record exhibits no Federal "question. The motion is denied. The plaintiff "claimed and set up a right under the Constitution "of the United States, and the decision of the Su- "preme Court of the State was tantamount to the "denial of that right. Kaukauna Co. *vs.* Green Bay "&c. Canal Co., 142 U. S., 254."

In Kaukauna Co. *vs.* Green Bay, &c., Canal Co., 142 U. S., 254, 269, it was said:—

"The only question involved in this case proper "for us to consider, is whether the act of legislature

"of Wisconsin of August 8th, 1848, reserving to the "State the water power created by the erection of "the dam over the Fox River, as construed by the "Supreme Court of the State, and the proceedings "thereunder, operated to deprive the plaintiffs in "error of their property without due process of law. "Notwithstanding the inhibition of the Constitution "is not distinctly put in issue by the pleadings, nor "directly passed upon in the opinion of the court, it "is evident that the court could not have reached a "conclusion adverse to the defendant company with-"out holding, either that none of its property had "been taken, or that it was not entitled to compen-"sation therefor, which is equivalent to saying that "it had not been deprived of its property without "due process of law. This court has had frequent "occasion to hold that it is not always necessary "that the Federal question should appear affirma-"tively on the record, or in the opinion, if an ad-"judication of such question were necessarily in-"volved in the disposition of the case by the State "court. Willson *vs.* Blackbird Creek Marsh Co., 2 "Pet., 245; Armstrong *vs.* Athens County, 16 Pet., "281; Chicago Life Insurance Co. *vs.* Needles, 113 "U. S., 574; Eureka Lake Co. *vs.* Yuba County, 116 "U. S., 410."

JOHN G. JOHNSON,
For Plaintiff in Error.



IN THE SUPREME COURT OF THE UNITED STATES.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

William Hughes and Benjamin T. A. Fleming, trading as Hughes & Fleming, Defendants in Error.

October Term, 1903.

No. 56.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR DEFENDANTS IN ERROR.

I. THE SUPREME COURT OF THE UNITED STATES HAS NO JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA IN THIS CASE.

The number of assignments of error in this case has been growing in a sort of geometrical progression. In the Court of Common Pleas, No. 2, for the county of Philadelphia, where the case was originally tried, two errors only were alleged, and two errors only were certified by his Honor, JUDGE SULZBERGER, who presided at the trial. Both of these alleged errors consisted of refusals to charge the jury as requested by the counsel for defendants (plaintiffs in error here), as follows:—

> "That it was lawful in the State of New York for the carrier to limit its liability by a special contract for an injury resulting from its negligence; that said contract having been for a through consignment

from Albany to Cynwyd, a place within this State, said contract must be considered in its entirety, and is incapable of divisibility; that said contract having stipulated for an agreed valuation of the stock shipped, the parties must be governed by its terms throughout the entire route, as said contract must be interpreted and enforced here by the law of the place where it was made, and within which State it is partly performed; and that consequently the plaintiff is not entitled to recover in excess of the valuation agreed upon by the parties at the time of shipment."

(Specification of error No. 1.)

"That the plaintiff is not entitled to recover in excess of $100."

(Specification of error No. 2.)

It will be noticed that not one word in either of these two points for charge mentions directly or indirectly, even in the most indefinite way, either the Constitution of the United States or the laws or treaties of the United States or the validity of any of the latter; nor did either of them specially set up or claim any title, right, privilege, or immunity under the Constitution of the United States or under any treaty, statute, commission, or authority thereof.

When we find these two specifications of error in the paper book of the appellant in the Supreme Court of Pennsylvania (pages XII. and XIII.) we discover that they have become three. The third specification is entirely new, and is in these words:—

"The learned court below erred in entering judgment in conflict with the Act of Congress of February 4th, 1887, entitled 'An Act to regulate commerce.' Section 1 of said Act clearly provides that where the transportation is from one State to another, under a through bill of lading, that its provisions

shall be carried out unless it be in conflict with a statute of the State in which it may be performed or in conflict with the policy of the United States as laid down in the Federal courts, and that as the contract was valid in the place where made, and as there is no statute in Pennsylvania prohibitory of an agreed valuation to establish a rate, and as it is consistent with the policy of the United States as declared by the Federal courts, the judgment should have been for the valuation mentioned in the contract."

The Supreme Court of Pennsylvania, by MR. JUSTICE POTTER, say in reference to this third point, on page 229 of the report of the case in that court, to be found in 202 Pennsylvania State Reports, page 222:—

"The third assignment of error suggests that the entry of judgment is in conflict with the Interstate Commerce Act of Congress. This seems to be an afterthought, as there is no indication in the record that this question was raised or considered in the court below. It is not apparent how the Act can have any application to this case. It contains nothing bearing on the validity of this contract limiting the liability of a railroad for loss or injury caused by negligence. The object of the Act seems to be to secure continuous carriage and uniform rates, and to compel the furnishing equal facilities. We cannot see that the entry of judgment in this case interferes in any way with the legitimate exercise of interstate commerce."

When the two original specifications of error reach this court, by some occult principle of multiplication they have further grown to nine, and we find that a rather ungenerous use has been made of JUSTICE POTTER's courteous declination to consider the supposed Federal question, by which it is made to appear that it was really considered and ruled upon.

For the Supreme Court of Pennsylvania to have done this in the face of their well-settled rule to the contrary as to exceptions not raised in the trial court would have been to overthrow a long line of consistent decisions of that court, of which it is only necessary to call the attention of this court to

Walls *vs.* Campbell (1889), 125 Pa., 346;
Hartley *vs.* Decker (1879), 89 Pa., 470;
Bank *vs.* Schuylkill Co. (1899), 190 Pa., 188.

It will thus be seen that it was entirely a matter of grace on the part of the Supreme Court of Pennsylvania to do any more than entirely ignore the third assignment of error raised in that court, and it is submitted that the attempt on the part of these plaintiffs in error to magnify the brief words of a further allusion to it in JUSTICE POTTER'S opinion into a formal consideration of it is an obvious effort to secure a precarious foothold of jurisdiction in this court at all hazards and at the expense of any inconsistency.

Passing by, for the present, however, the obvious imperfections of form and irregularity of presentment in these specifications of error, let us consider whether they present such a Federal question as will be considered by this court to give jurisdiction.

As has been held in a long line of decisions, the jurisdiction of this court to review the judgment of the highest court of a State is purely statutory, and will in all cases be strictly confined to questions arising under the provisions of section 709 of the Revised Statutes of the United States.

In Beals *vs.* Cone (1902), 188 U. S., 184, which was a mining suit brought under authority of sections 2325 and 2326, Revised Statutes United States, in the county court of El Paso, Col., to contest the right of the defendants to a patent for a mining claim, this court, speaking by MR. JUSTICE BREWER, said, on page 186:—

> "The jurisdiction of this court is denied. The validity of a treaty or statute of or authority ex-

ercised under the United States was not drawn in question in the State courts, nor was the validity of a statute of or authority exercised under the State of Colorado challenged on the ground of being repugnant to the Constitution, treaties or laws of the United States. So that the jurisdiction of this court depends on whether some title, right, privilege, or immunity of a Federal nature was specially set up and claimed by the plaintiff in error and denied by the State courts. Rev. St., section 709."

Nor does the mere averment of the existence of Federal jurisdiction necessarily involve the attaching of that jurisdiction. Thus in Hamblin *vs.* Western Land Company (1892), 147 U. S., 531, this court, again speaking by MR. JUSTICE BREWER, said, on page 532:—

"It is doubtful whether there is a Federal question in this case. A real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgments of State courts. Millingar *vs.* Hartupee, 6 Wall., 258; New Orleans *vs.* New Orleans Water Works Co., 142 U. S., 79, 87. In the latter case it was said that 'the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.'"

Again, in New Orleans Water Works Company *vs.* Louisiana (1901), 185 U. S., 336, this court emphasized the same doctrine in an opinion by MR. JUSTICE PECKHAM, in the course of which it is said, at page 344:—

"It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of State courts there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple set-

> ting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit; there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up. Thus in *Millingar vs.* Hartupee, 6 Wall., 258, the Chief Justice, at page 261, said: 'Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the Act is one having a real existence, derived from competent governmental power.' This case arose under the twenty-fifth section of the Judiciary Act, and jurisdiction was sought to be maintained upon the assertion that the validity of an authority exercised under the United States was drawn in question, and the decision was against its validity. It was held not sufficient to make the claim, but there must be some color of foundation for its assertion."

After summarizing several of the important decisions on this point, MR. JUSTICE PECKHAM adds:—

> "These cases show the rule and its limitations, and where by the record it appears that although a claim of a Federal question had been plainly made, if it also clearly appear that it lacked all color of merit, and had no substance or foundation, the mere fact that it was raised is not sufficient to give this court jurisdiction."

And this view was reiterated in the very recent case of Sawyer *vs.* Piper (1903), to be reported in 189 U. S., 154, where a writ of error to the Supreme Court of Minnesota was dismissed without any consideration of the merits of the controversy in the State courts, on the single ground that it was obvious upon the face of the pleadings that no real Federal question was involved.

Applying these well-established principles to the facts of this case, it appears that the jurisdiction of this court

is invoked by the plaintiff in error to review a decision of the Supreme Court of Pennsylvania holding that a common carrier corporation chartered by the laws of that State may not set up as a defense a contract restricting its liabilities for damages as such common carrier, even when the freight for whose loss damages were claimed was *shipped into Pennsylvania from* a State where such contract would have been valid, on the ground that such a decision "is in conflict with the Act of Congress of February 4th, 1887, known as 'The Interstate Commerce Act.'"

To assert this claim is virtually to expose the error of the argument. The Act of February 4th, 1887 has long been clearly understood and its scope long ago clearly defined. It is, as its title indicates, "an Act to regulate commerce," and the substance of the provisions of its several sections as set forth in the marginal summary of each in the supplement to the Revised Statutes of the United States is to prohibit unreasonable charges for freight and passenger interstate transportation; to prohibit special rates and rebates; to prohibit undue preferences; to compel the furnishing of equal facilities to connecting lines of transportation; to prohibit pooling of rates; to prohibit combinations to prevent continuous carriage of freight to destination; to create a commission to enforce its provisions, and to regulate the workings and procedure of that commission, and further miscellaneous provisions. From first to last of the Act there is not a word which could possibly be transformed into a reference to contracts made by a carrier in restriction of liability for damages, or that there was any intention to legislate concerning them. Yet in the face of this fact the assertion is gravely put forth by the third assignment of error in the Pennsylvania Supreme Court, as quoted above, that—

> "Section 1 of said Act clearly provides that where the transportation is from one State to another, under a through bill of lading, that its provisions shall be

carried out unless it be in conflict with a statute of the State in which it may be performed or in conflict with the policy of the United States as laid down in the Federal courts."

Now let us put side by side with this a summary of the first section of the Act as stated in the margin of the Revised Statutes.

Paragraph I. provides to what sort of common carriers the Act shall be applicable.

Paragraph II. adds a proviso that no part of the Act shall be held to apply to any traffic wholly within one State.

Paragraph III. defines the terms "railroad" and "transportation" as used throughout the Act.

Paragraph IV. enacts that all charges made for transportation shall be reasonable and just.

Paragraph V. declares all unreasonable and unjust charges unlawful.

That is all of section I. of the Act of February 4th, 1887, which it is asserted with apparent seriousness is contravened by this decision of the Supreme Court of Pennsylvania declaring ineffectual any attempt of a common carrier under the well-settled law of the State to limit his liability for negligence to an agreed valuation beforehand.

It is submitted that such an assignment is so obvious an effort to manufacture a Federal question where none exists in order to secure a further review of a case already twice decided as to be without even the color of claim to consideration by this court.

Furthermore, as has already been noticed, even assuming that the assignment possessed any merit, it was raised too late. No suggestion was made of it in the trial court, and it was not considered in the Supreme Court of Pennsylvania except to be dismissed as undeserving of consideration.

In the case of Equitable Life Assurance Society *vs.* Brown (1902), 187 U. S., 308, brought to this court

by writ of error to the Supreme Court of the Territory of Hawaii, MR. JUSTICE WHITE, in delivering the opinion of this court, said on page 310:—

> "When the suit came to trial in the Hawaiian Court, no judgment having been rendered in the suit brought in New York, the defendant corporation, to support its contention that the plaintiff was not entitled to recover, claimed the benefit of the due faith and credit clause of the Constitution of the United States, and to sustain this asserted right offered proof of the appointment of the New York administrator and tendered an exemplification of the record of the proceedings had in the action, brought by the New York administrator in the Federal court in that State. The trial court rejected the evidence and exceptions were duly taken. A verdict was returned in favor of the plaintiff for the full amount sued for. The case having been taken to the Supreme Court of the Territory the judgment was affirmed, the court expressly deciding that the right asserted under the due faith and credit clause of the Constitution of the United States was without merit. From the foregoing it results that a claim under the Constitution and laws of the United States was made and decided in the court below, and if the fact that such a claim was formally made and disposed of below without reference to its substantial foundation determines the question of jurisdiction, the motion to dismiss must be denied. But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. There must be a real substantive question on which the case may be made to turn, that is, a real and not a merely formal Federal question is essential to the jurisdiction of this court. Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer

jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. New Orleans Water Works Co. *vs.* Louisiana, 185 U. S., 336, 345, and authorities there cited."

And in the case of San Jose Land and Water Company *vs.* San Jose Ranch Company (1902), 189 U. S., 177, it was said by MR. JUSTICE BROWN, in delivering this court's opinion, that while the record did not show any Federal right set up on the trial of the case, yet as the point had been raised in the Appellate Court of the State, and *fully considered by that tribunal*, it was sufficiently "specially set up and claimed" to be regularly before this court on a writ of error to the Supreme Court of California. In this case, the full and elaborate discussion of the alleged Federal question by the California Supreme Court need only be examined to see what is the meaning of the phrase "fully considered by that tribunal."

See also Onandaga Nation *vs.* Thacher (1902), 189 U. S., 306.

II. NOTHING IN THE RULE OF PENNSYLVANIA LAW APPLIED IN THIS CASE JUSTIFIES THE ASSUMPTION THAT IT INTERFERES WITH OR REGULATES INTERSTATE COMMERCE.

Before accepting as correct the argument of the appellant that the rule of Pennsylvania law applied in this case amounts to a regulation of or interference with interstate commerce it is necessary to understand clearly what the rule of law is and what were the facts to which it was applied. The appellant reads into the opinion of the Supreme Court of Pennsylvania several propositions of law which that opinion does not assert, and assumes several things as facts in the case which the opinion refuses to admit. Briefly and accurately stated, the rule of Pennsylvania law applied here is that the policy of

her laws prohibits a corporation created by her and transacting the business of a common carrier within her borders from limiting its liability for negligence by any form of contract, and that this rule will be applied by Pennsylvania courts to a contract made by a Pennsylvania corporation through an agent in another State. Obviously, therefore, no question can arise until a corporation created by her is charged in her courts with negligence occurring in Pennsylvania, when the defense interposed is a contract stipulating for some form of limited liability. What may be the law in other jurisdictions, even though the contract was made through the company's agent in an adjoining State, is an irrelevant matter, provided the contract is to be performed in Pennsylvania. The fact that the agent making the contract was another railroad company whose tracks are physically connected with those of the Pennsylvania corporation is equally unimportant, unless it can be shown that the contract of several different companies was entire and not severable. In the case at bar, no opinion was intimated as to how the Pennsylvania Supreme Court would deal with such an entire contract. The court did not overlook the fact that several different contracts for the carriage of goods by different railroads through more than one State might be called an interstate commerce transaction, and that the contract in this case was so called by the appellant. But the case as presented could not be treated as such a transaction until the appellant had shown that the contract was entire and not severable. The opinion shows just as plainly that the Pennsylvania Supreme Court was prepared to give full faith and credit to a contract valid in the State where made, even though the policy of the laws of that State differed from the policy of Pennsylvania law. Instances were cited in which the Pennsylvania Supreme Court had enforced a contract limiting the liability of a common carrier for negligence because made and performed in States where such limitation of liability was permitted. Pennsylvania distinctly refuses to allow her courts to be the resort of

citizens of other States who could not recover in their own courts on a cause of action arising under a different system of law. (Forepaugh *vs.* Delaware, &c., R. Co. (1889), 128 Pa., 217, 230; Fairchild *vs.* Philadelphia, &c., R. Co. (1892), 148 Pa., 527, as explained in the opinion of the Pennsylvania Supreme Court in the case at bar.)

The appellant urged in the State Supreme Court and insists here that the contract was entire. The Pennsylvania Supreme Court held to the contrary, saying:—

> "Careful consideration of the contract and of the evidence shows that the contract in this case was not entire, either as to the obligation of the carrier to transport or of the shipper to pay the freight. The New York Central Railroad made no contract for itself beyond its own lines; it acted as agent only for the connecting carrier. It is the same as though each carrier had separately agreed to transport over its own line, and the freight charges were shown to be made up of two distinct sums. One being the amount from Albany to Jersey City, and the other from Jersey City to Cynwyd."

It is clear, therefore, that the contract here involved was the ordinary form of a limited liability live-stock contract in common use among the railroads of this country. But while these railroads connect with each other and transport goods among different States under a common form of contract they have not yet reached the point in their business relations with each other of agreeing to assume any liability beyond their own lines or to make contracts for connecting railroads otherwise than as agent simply. They do this for their own protection and to avoid the very consequence of being charged with a liability caused by the negligence of some other carrier and arising, perhaps, out of the application of a different system of law from that which governs them. The appellant argues that because the agreements of the two corporations are included in one contract which provided for a continuous shipment over both railroads and across State

lines that this is an interstate commerce transaction. No one disputes that fact. What the appellee denies is the appellant's erroneous deductions of law from a correct statement of fact.

The first of these deductions is that because the United States Constitution gives Congress the power to regulate interstate commerce no state can adopt a rule of law such as was applied in the case at bar. The appellee admits without question that the power of Congress over this matter is supreme. Hence, that Congress might prescribe by law that every contract for the shipment of goods across state lines should be regarded as an entire contract, although made by several different railroads, and that a limitation of the carrier's liability like that made here should be deemed just and reasonable in the eyes of the law. Thus far, however, Congress has not seen fit to exercise its undoubted power in this way. Any one is at liberty to claim that it is unfortunate that Congress has not gone that far since the inevitable consequence must be that the laws of the several states will conflict, more or less, on such subjects.

The second erroneous deduction from the fact that this contract related to interstate commerce is that because Congress has passed the Interstate Commerce Act of 1887, and the general policy of that Act is to secure uniformity in certain matters the several states are bound so to mold their state law as to produce uniformity in matters which the Interstate Commerce Act does not attempt to regulate. It is submitted that what has been said on this subject, under an earlier section of this brief, shows that the act of Congress will be searched in vain for any such provision.

The third erroneous deduction from the fact that this contract related to interstate commerce is that because this court has laid down the rule of law applied in Hart *vs.* Pennsylvania R. R. Co. (1884), 112 U. S., 331, the Supreme Court of Pennsylvania was bound to follow that decision and apply that rule to the contract involved in the case at bar.

The appellant argues that the rule of Pennsylvania law applied in this case amounts to a regulation of or interference with interstate commerce. What has been said, however, shows that the rule of law is not what the appellant asserts it to be, and that the character of the contract in question was quite different from that upon which the appellant's argument is based. The Pennsylvania Supreme Court has declared it to be the policy of Pennsylvania law that a Pennsylvania common carrier shall not be permitted to contract against liability for its own negligence, even though such a contract is made for it by its agent in a state where such a contract would be valid. The question for the consideration of this court is, therefore, whether the state of Pennsylvania should be sustained in applying the rule of law thus limited to a contract like this. It is submitted that there can be only one answer to this question.

Nothing is better settled by repeated decisions of this court than the fact that the Federal power to regulate interstate commerce, however absolute and exclusive, is not a complete denial of the power of a state to control its own corporations engaged in interstate commerce. In spite of the Federal power, many state laws in the nature of police regulations of such corporations have been sustained, although it was admitted that such laws had an incidental effect upon interstate commerce. In at least one instance a state statute, distinctly prohibiting a corporation from exempting itself from liability as a common carrier by any form of contract, was sustained by this court as not amounting to a regulation of interstate commerce, and as within the power of the state to adopt, in spite of its incidental effect upon interstate commerce.

In Chicago, Milwaukee, &c., Ry. *vs.* Solan (1898), 169 U. S., 133, 136, this court interpreted the following provision of the Code of Iowa: "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would

exist had no contract, receipt, rule, or regulation been made or entered into." The action was by a drover in charge of a herd of cattle, to recover for injuries to himself through the alleged negligence of the railroad company. The defense was that the drover had signed a contract, providing "that the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount exceeding the sum of $500." The cattle were loaded at a town in Iowa for shipment to Chicago. The accident, causing the injury, occurred in Iowa, where the suit was brought. The company averred in its pleadings and offered to prove that in consideration of the above clause of the contract it had agreed to transport the cattle for a less sum than its regular usual charges, but such evidence was excluded at the trial. An essential part of the defense was that the contract related exclusively to interstate transportation, and constituted an interstate commerce transaction, and was a valid and legal contract at the common law; also, that the section of the Iowa Code above quoted was void and unconstitutional as an attempt to regulate and limit contracts relating to interstate commerce. A verdict for the plaintiff for $1000 was sustained both in the Supreme Court of Iowa and in this court. In the opinion of this court, by MR. JUSTICE GRAY, it was said:—

> "The question presented by this writ of error is whether the statute, as applied to a claim for an injury happening within the state, under a contract for interstate transportation, contravenes the provision of the Constitution of the United States empowering Congress to regulate interstate commerce.
>
> "This question is substantially answered by previous judgments of this court.
>
> "The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely

local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the state in which the cause of action arises. But the law to be applied is none the less the law of the state; and may be changed by its legislature, except so far as restrained by the constitution of the state, or by the constitution or laws of the United States. Railroad Company *vs.* Lockwood, 17 Wall., 357, 368; Hough *vs.* Railway Co., 100 U. S., 213, 226; Burgess *vs.* Seligman, 107 U. S., 20, 33; Myrick *vs.* Michigan Central Railroad, 107 U. S., 102, 109; Smith *vs.* Alabama, 124 U. S., 465, 476-478; Lake Shore, &c., Railway *vs.* Prentice, 147 U. S., 101, 106; Baltimore & Ohio Railroad *vs.* Baugh, 149 U. S., 368; Paine *vs.* Central Vermont Railroad, 118 U. S., 152, 161.

"Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a state, are subject to its law. It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a state, to the protection of that state as those who travel on domestic trains. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power

of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control in some degree the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.

"Such are the grounds upon which it has been held to be within the power of the state to require the engineers and other persons, engaged in the driving or management of all railroad trains passing through the state, to submit to an examination by a local board as to their fitness for their positions; or to prescribe the mode of heating passenger cars in such trains. Smith *vs.* Alabama, 124 U. S., 465; Nashville, &c., Railway *vs.* Alabama, 128 U. S., 96; New York, New Haven & Hartford Railroad *vs.* New York, 165 U. S., 628. See also, Western Union Tel. Co. *vs.* James, 162 U. S., 650; Hennington *vs.* Georgia, 163 U. S., 299; Gladstone *vs.* Minnesota, 166 U. S., 427.

"The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax

upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

The case just cited was affirmed in the following cases:—

Richmond, etc., R. Co. *vs.* Patterson Tobacco Co. (1898), 169 U. S., 311, 315;

Missouri, etc., Ry. Co. *vs.* Haber (1898), 169 U. S., 613, 627;

Calderon *vs.* Atlas Steamship Co. (1898), 170 U. S., 272, 282;

Lake Shore, etc., Ry. Co. *vs.* Ohio (1899), 173 U. S., 285, 296;

Cleveland, etc., Ry. Co. *vs.* Illinois (1900), 177 U. S., 514, 517.

In Richmond, etc., R. Co. *vs.* Patterson Tobacco Co. (1898), 169 U. S., 311, it was held, as stated in the syllabus, as follows: Section 1295 of the Virginia Code of 1887, enacting that "when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge," does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of

evidence, ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own lines, nevertheless, by agreement, its liability was limited to its own line; and it does not conflict with the provisions of the Constitution of the United States touching interstate commerce. The court, in an opinion by MR. JUSTICE WHITE, said, on page 315:—

> "Of course, in a latitudinarian sense, any restriction as to the evidence of a contract relating to interstate commerce may be said to be a limitation on the contract itself. But this remote effect, resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proven, does not amount to a regulation of interstate commerce. The principle on this subject has been often stated by this court, and, indeed, has been quite recently so fully reviewed and applied that further elaboration becomes unnecessary. In the case of Chicago, &c., Ry. Co. *vs.* Solan, 169 U. S., 133, 137-138, it was said, * * *"

In Cleveland, etc., Ry. Co. *vs.* Illinois (1899), 177 U. S., 514, 516, this court, in an opinion by MR. JUSTICE BROWN, said:—

> "Few classes of cases have become more common of recent years than those wherein the police power of the state over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good.
>
> "We have recently applied this doctrine to state laws requiring locomotive engineers to be examined

and licensed by the state authorities, Smith *vs.* Alabama, 124 U. S., 465; requiring such engineers to be examined from time to time with respect to their ability to distinguish colors, Nashville, &c., Ry. *vs.* Alabama, 128 U. S., 96; requiring telegraph companies to receive dispatches, and transmit and deliver them with due diligence, as applied to messages from outside the state, Western Union Tel. Co. *vs.* James, 162 U. S., 650; forbidding the running of freight trains on Sunday, Hennington *vs.* Georgia, 163 U. S., 299; requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations, Railway Company *vs.* Fuller, 17 Wall., 560; forbidding the consolidation of parallel or competing lines of railway, Louisville & Nashville Railroad *vs.* Kentucky, 161 U. S., 677; regulating the heating of passengers cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto, N. Y., N. H., &c., Railroad Co. *vs.* New York, 165 U. S., 628; providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made, Chicago, Milwaukee, &c., Railway *vs.* Solan, 169 U. S., 133; and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for such carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent, Richmond & Allegheny Railroad *vs.* Patterson Tobacco Co., 169 U. S., 311. In none of these cases was it thought that the regulations were unreasonable or operated in any just sense as a restriction upon interstate commerce."

Under the principles of these decisions it is clear that the rule of Pennsylvania law, applied in the decision of this case, could not possibly amount to an attempted interference with or regulation of interstate commerce.

III. THE ALLEGED RIGHT TO SUE OUT A WRIT OF ERROR IN THIS COURT DEPENDED UPON THE EXISTENCE OF A FEDERAL QUESTION, WHICH WAS DECIDED ADVERSELY TO THE APPELLANT BY THE PENNSYLVANIA SUPREME COURT. SINCE NO SUCH FEDERAL QUESTION AROSE IN THE CASE, THIS COURT WILL DECLINE TO INTERFERE WITH THE POLICY OF PENNSYLVANIA LAW AS DECLARED BY THE HIGHEST COURT OF THAT STATE.

Unless the appellant can show that a Federal question was involved in the decision of this case he has no standing in this court to sue out a writ of error. It would not be pretended that this court had jurisdiction unless a Federal question was involved and the Federal right claimed had been decided adversely to the appellant by the Pennsylvania Supreme Court. The so-called Federal question is the application of a rule of Pennsylvania law alleged to be an interference with or restriction upon interstate commerce. It has been shown, however, that no possible Federal question could arise out of the facts. The only contract which the Pennsylvania Supreme Court attempted to consider and pass upon was one by which the Pennsylvania Railroad Company agreed with the plaintiffs below to transport a valuable race horse from Weehawken, N. J., to Cynwyd, Pa. The consideration for the company's undertaking was to be the payment of an unknown freight charge upon the delivery of the horse at Cynwyd. This contract was drawn up and executed in Albany, N. Y., by agents for the respective principals. At the same time and in the same contract another railroad company, a corporation of New York, undertook to transport the horse from Albany to Weehawken, and there deliver him to the Pennsylvania Railroad Company. The latter contract stipulated carefully against liability for the negligence of a connecting car-

rier, and in terms declared that it made the contract as such connecting carrier's agent and on its behalf. The Pennsylvania Railroad Company did not deny the existence of a contractual relation thus created between it and the plaintiffs below. Nor did it deny that the cause of action arose through the negligence of its servants while transporting the horse from Philadelphia to Cynwyd, Pa. Under these circumstances the Pennsylvania courts refused to consider either the fact that a New York corporation was a party to a contract made at the same time which had been fully performed, or that the Pennsylvania Railroad also had agreed to transport the horse across New Jersey and had performed that part of its contract safely. The Pennsylvania courts did consider and pass upon that part of the contract of a Pennsylvania corporation which it had attempted to perform within the borders of the state, and had failed to comply with through the negligence of its own servants. In doing so they applied a rule of local law which declared that it was the settled legal policy of the state that none of its corporations engaged in the business of common carriers should be permitted to contract against liability for negligence; that this was such a contract, and was no less invaiid when made in a jurisdiction where such a contract would be held lawful, because while made elsewhere it was to be performed in Pennsylvania.

Let it be assumed for the sake of argument that the policy of the law established by the decisions of this court is in direct conflict on this question with the policy of Pennsylvania law. The appellant argues that when this fact is established this court will compel the Pennsylvania court to change the policy of the Pennsylvania law to conform with its opinion. The argument admits that this is a court of limited jurisdiction depending upon the existence of a Federal question, and assumes that a Federal question was involved here because the rule applied in the court below amounts to an interference with interstate commerce. But the decision of the Pennsylvania Supreme Court points out that it failed to see how

the facts before it involved any Federal question, and it repudiated any purpose to determine a question of interstate commerce. It claimed the right to decide what would be a lawful contract for one of its own corporations to make when that contract was to be performed within the limits of the state. It held that the same principle would govern if the contract was made by an agent of the corporation in a jurisdiction where a different system of law prevailed. What is there in all this to justify the claim that the rule of Pennsylvania law interferes with or restricts interstate commerce? It is suggested that the contract related to interstate transportation, and this is admitted; and that it was an entire contract, but this is disproved by mere examination of its terms; and that it was valid where made and hence must be valid everywhere, but this statement will be recognized at once as a misleading generalization of a rule of law of very limited application.

The question at issue, therefore, is not whether the policy of the law administered in this court agrees with that adopted in Pennsylvania, or which policy this court considers to be the better, but whether the facts of this case present such a Federal question as must exist to give jurisdiction and call for the expression of an opinion. It is submitted that the appellant only has succeeded in showing that a conflict exists in the policy of the law administered by two separate tribunals, each of which is supreme within its own sphere and has failed entirely in the effort to show that he has any standing in this court.

IV. THE APPELLANT CANNOT IMPORT A FEDERAL QUESTION INTO THE FACTS OF THIS CASE BY ARGUMENTS DRAWN FROM "THE COMMON LAW OF THE UNITED STATES" WHICH IS SAID TO PROMULGATE "THE PUBLIC POLICY OF THE UNITED STATES."

Failing to find a Federal question fairly arising out of the facts of this case and seasonably asserted in the state

courts, the appellant has been compelled to resort to an alleged body of law which is called "The Common Law of the United States," and which may be supposed to promulgate "The Public Policy of the United States." It is submitted that all that is said on these subjects merely tends to confusion of thought about matters that in themselves are entirely clear.

No one doubts that this court is the final arbiter in the decision of all questions involving Federal law; or that in the decision of many other controversies which come before it applies the local law of particular states as interpreted by the highest courts of such states; or that in a more limited class of cases involving principles of general as distinguished from state law it will be guided solely by its own opinion of what those principles are. A very superficial study of the decisions of this court will show how difficult many of these questions become under a system of government like ours. Relying upon some of the decisions discussing some of these difficulties the appellant deduces certain arguments founded upon the existence of a supposed common law of the United States as distinguished from the common law of the several states, and refers to the public policy of the United States. It is submitted that these arguments require little discussion.

It is said that under the common law of the United States the limitation of liability in this common carrier's contract must be held a just and reasonable modification of its old common-law liability because this court has so decided in Hart *vs.* The Pennsylvania R. R. Co. (1884), 112 U. S., 331. But this court only can apply the common law of the United States to the decision of cases within its appellate jurisdiction and properly brought before it. Recognizing that a Federal question must be the foundation of its jurisdiction the appellant finds the Federal question in a so-called public policy of the United States. That policy is said to require that interstate commerce shall be regulated by a uniform system of law, and that such a purpose on the part of Congress has

been manifested in the Interstate Commerce Act. In spite of the fact that this Act does not prescribe what shall be just and reasonable limitations of their old common-law liability in the contracts of common carriers the whole matter of interstate commerce must be regulated by the principles, either suggested in that Act or found in the common law of the United States. The appellant argues, therefore, that when this court once has decided that a limitation of liability like that attempted here is just and reasonable, every state court must follow this decision. But that decision was made in a case wherein the jurisdiction of this court was not in the slightest doubt. A like decision could not be made in the case at bar unless the jurisdiction of this court to decide this controversy first is established. This court cannot be expected to trace its jurisdiction from some vague system of common law of the United States. It must be found in a Federal question properly presented by the facts in issue. The Supreme Court of Pennsylvania has said that these facts did not involve any question of interstate commerce properly so called, and it is submitted that this decision was clearly right.

Moreover, the Supreme Court of Pennsylvania has respectfully asserted its right to an independent opinion upon the rule laid down in Hart *vs.* The Pennsylvania R. R. Co. (1884), 112 U. S., 331.

In Grogan *vs.* Adams Express Co. (1886), 114 Pa., 523, 528, the trial court following the decision in the Hart case charged the jury accordingly, and this was held to be error in the following language in the Supreme Court's opinion:—

> "In addition, however, to this the learned court further charged the jury that the defendant could limit its own liability, even as against its own negligence and had done so by the receipt given to the plaintiffs when the goods were shipped.
>
> "This was done in obedience to a decision of the Supreme Court of the United States, in the case of

Hart *vs.* The Penna. R. R. Co., 112 U. S. Rep., 331. An examination of that case shows that such is the law as declared by that court, and if the decision were of binding authority upon us we would be obliged to follow it. But our own decisions for a long time have established the opposite doctrine, until it has become firmly fixed in our system of jurisprudence. We could not depart from it now without overruling them all, and we are not willing to do so. The authorities upon the general subject are very numerous and conflicting. But with us the rule has been uniform and we prefer to adhere to it."

A. S. L. SHIELDS,
For Defendants in Error.

Supreme Court of the United States.

No. 56.—October Term, 1903.

The Pennsylvania Railroad Company, Plaintiff in Error, *vs.* William Hughes and Benjamin F. A. Fleming, trading as Hughes and Fleming.	In error to the Supreme Court of the State of Pennsylvania.

[December 7, 1903.]

The defendants in error brought suit in the Court of Common Pleas of Philadelphia against the Pennsylvania Railroad Company, to recover for injuries to a horse shipped by them from Albany in the State of New York to Cynwyd, in the State of Pennsylvania. The shipment was under a bill of lading of the New York Central and Hudson River Railroad Company, bearing date of August 10, 1900. It recited the receipt of the horse—

"for transportation from —— to destination, if on the said carrier's line of railroad otherwise to the place where said live stock is to be received by the connecting carriers for transportation to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers, for transportation, subject to the official tariffs, classifications and rules of the said company, and upon the following terms and conditions, which are admitted and accepted by the said shipper as just and reasonable, viz:

"That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of — per —, which is the lower published tariff rate, upon the express condition that the carrier assumes liability on the said live stock to the extent only of the following agreed valuation, upon which valuation is based the rate charged for the transportation of the said animals, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers, or their employees or otherwise.

"If horses or mules—not exceeding one hundred dollars each."

The through rate of freight was not filled out in the blanks in the shipping receipt or the bill of lading, but was collected by the agent of the Pennsylvania Railroad Company at Cynwyd, and it appears was the reduced tariff rate usually charged on such shipments where the limited liability clause above recited is inserted. The shipper signed the bill of lading, which contained the following stipulations:

"Thomas Grady does hereby acknowledge that he had the option of shipping the above-described live stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and

connecting carriers, and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies, as common carriers of the said live stock, upon their respective roads and lines, but has voluntarily decided to ship the same under this contract at the reduced rate of freight above first mentioned."

The agreement further provided:

"No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation."

Upon the trial the jury returned a verdict in favor of the plaintiff for $10,000 and judgment was rendered accordingly. The horse was transported in safety to the end of the line of the receiving carrier and delivered to the defendant company, and injured while the car in which he was shipped was standing on the track of the Pennsylvania Railroad Company in the city of Philadelphia, it being run into by heavily laden cars.

Upon appeal to the Supreme Court of Pennsylvania, the judgment was affirmed. (202 Pa. St. 222.)

Mr. Justice DAY delivered the opinion of the Court.

The right to review the judgment of the Supreme Court of Pennsylvania herein depends upon the proper assertion of a right or privilege under the Federal Constitution or statutes which was denied to the plaintiff in error by the adverse holding of the State court.

Upon the trial in the Common Pleas Court, it was contended that the special contract above recited limited the recovery of the plaintiff to the sum of one hundred dollars. The court refused to so charge, but, holding that the policy and law of Pennsylvania, as declared by her her courts of last resort, did not permit such limitations on the liability of common carriers, left to the jury to determine the value of the horse and the question of the negligence of the defendant.

In view of being carried to the Supreme Court of Pennsylvania, two errors were assigned to the refusal of the court to charge:

"1. That it was lawful in the State of New York for the carrier to limit its liability by a special contract for an injury resulting from its negligence; that said contract having been for a through consignment from Albany to Cynwyd, a place within this State, said contract must be considered in its entirety, and is incapable of divisibility; that said contract having stipulated for an agreed valuation of the stock shipped, the parties must be governed by its terms throughout the entire route, as said contract must be interpreted and enforced here by the law of the place where it

was made, and within which State it is partly performed; and that consequently the plaintiff is not entitled to recover in excess of the valuation agreed upon by the parties at the time of shipment.

"2. That the plaintiff is not entitled to recover in excess of $100."

Neither of these assignments of error presents a Federal question in such sense as to give this court jurisdiction to review the judgment of the State court under section 709 of the Revised Statutes of the United States. Nothing is better settled in Federal jurisprudence than that the jurisdiction of this court in such cases depends upon the assertion of a right, title, privilege or immunity under the Federal Constitution or laws set up and denied in the State courts. (*Beals* v. *Cone*, 188 U. S. 184.)

The first error assigned in the Common Pleas Court raised the question as to the law of the contract. It does not assert that any Federal right was invaded or denied. It seems to have been conceded at the trial that the law of the State of New York where the contract was made permitted the making of a contract limiting the liability of the carrier to the agreed valuation in consideration of the lower freight rate for carriage, the shipper having the opportunity to have the larger liability for the value of the goods if the higher rate of freight for carriage was paid. This rule also prevails in the courts of the United States, (*Hart* v. *Railroad*, 112 U. S. 331,) wherein it was held that a contract fairly made and signed by the shipper, agreeing on a valuation of the property carried, with a rate of freight based on such valuation, on the condition that the carrier assume liability only to the extent of such agreed valuation, in case of loss by the negligence of the carrier, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier is responsible and the freight received, and of protecting the carrier against extravagant valuations. But this is not a question of Federal law wherein the decision of the highest Federal tribunal is of conclusive authority. In *Grogan* v. *Adams*, (114 Pa. 523,) the Supreme Court of Pennsylvania expressly declined to follow the rule laid down in *Hart* v. *Railroad*, adhering to its own declared doctrine denying the right of a common carrier to thus limit its liability for injuries resulting from negligence. The cases are numerous and conflicting, different rules prevailing in different States. The Federal courts in cases of which they have jurisdiction will doubtless continue to follow the rule of the Hart case, but the highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the Federal Supreme Court where some right, title, immunity or privilege, the creation of the Federal power, has been asserted and denied. (*Bethel* v. *Demaret*, 10 Wall. 537; *Delmas* v. *Ins. Co.*, 14 Wall. 666; *Ins. Co.* v. *Hendren*, 92 U. S. 287; *United States* v. *Thompson*, 93 U. S. 586.)

In the Supreme Court of Pennsylvania a further assignment of error was made as follows:

"III. The learned court below erred in entering judgment in conflict with the act of Congress of February 4, 1887, entitled 'An act to regulate commerce.' Section 1 of said act clearly provides that where the transportation is from one State to another, under a through bill of lading, its provisions shall be carried out, unless it be in conflict with a statute of the State in which it may be performed, or in conflict with the policy of the United States as laid down in the Federal courts, and that, as the contract was valid in the place where made, and, as there is no statute in Pennsylvania prohibitory of an agreed valuation to establish a rate, and as it is consistent with the policy of the United States as declared by the Federal courts, the judgment should have been for the valuation mentioned in the contract."

Of this assignment of error, Mr. Justice Potter, delivering the opinion of the Supreme Court of Pennsylvania, said:

"The third assignment of error suggests that the entry of judgment is in conflict with the interstate commerce act of Congress. This seems to be an afterthought, as there is no indication in the record that this question was raised or considered in the court below. It is not apparent how the act can have any application to this case. It contains nothing bearing upon the validity of a contract limiting the liability of a railroad for loss or injury caused by negligence. The object of the act seems to me to be to secure continuous carriage and uniform rates, and to compel the furnishing of equal facilities. We cannot see that the entry of judgment in this case interferes in any way with the legitimate exercise of interstate commerce."

Upon the authority of *Missouri, Kansas City &c. R. Co.* v. *Elliott,* (184 U. S. 533,) it may be admitted that the question of the decision of the State court being in contravention of the legislation of Congress to regulate interstate commerce, was sufficiently made, and the adverse decision to the party claiming the benefit of that act, gives rise to the right of review here. In refusing to limit the recovery to the valuation agreed upon, did the State court deny to the company a right or privilege secured by the interstate commerce law? It may be assumed that under the broad power conferred upon Congress over interstate commerce as defined in repeated decisions of this court, it would be lawful for that body to make provision as to contracts for interstate carriage, permitting the carrier to limit its liability to a particular sum in consideration of lower freight rates for transportation. But upon examination of the terms of the law relied upon we fail to find any such provision therein. The sections of the interstate commerce law relied upon by the learned counsel for plaintiff in error, (24 U. S. Stat. 379–82; 25 U. S. Stat. 855,) provide for equal facilities to shippers for the interchange of traffic; for non-discrimination in freight rates; for keeping schedules of rates open to public inspection; for posting the same in public places, with certain particulars as to charges, rules

and regulations; for the publication of joint tariff rates for continuous transportation over one or more lines, to be made public when directed by the Interstate Commerce Commission; against advances in joint tariff rates except after ten days' notice to the commission; against reduction of joint tariff rates except after three days' like notice; making it unlawful for any party to a joint tariff to receive or demand a greater or less compensation for the transportation of property between points as to which a joint tariff is made different than is specified in the schedule filed with the commission; giving remedies for the enforcement of the foregoing provisions, and providing penalties for their violation; making it unlawful to prevent continuous carriage, and providing that no break of bulk, stoppage or interruption by the carrier, unless made in good faith for some necessary purpose without intention to evade the act, shall prevent the carriage of freights from being treated as one continuous carriage from the place of shipment to the place of destination.

While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, we look in vain for any regulation of the matter here in controversy. There is no sanction of agreements of this character limiting liability to stipulated valuations, and, until Congress shall legislate upon it, is there any valid objection to the State enforcing its own regulations upon the subject, although it may to this extent indirectly affect interstate commerce contracts of carriage?

It is well settled that the State may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic.

In *M. K. & T. Rwy.* v. *Haber*, (169 U. S. 614–635,) after reviewing previous cases in this court, Mr. Justice Harlan, delivering the opinion of the court, says:

"These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights and the performance of the duties of all persons within the jurisdiction of a State, belong primarily to such State under its reserved power to provide for the safety of all persons and property within its limits; and that even if the subject of such regulation be one that may be taken under the exclusive control of Congress, and be reached by national legislation, any action taken by the State upon that subject that does not directly interfere with rights secured by the Constitution of the United States or by some valid act of Congress, must be respected until Congress intervenes."

In the absence of Congressional legislation upon the subject, an act of the legislature of Alabama, to require locomotive engineers to be examined and licensed by a board to be appointed by the governor for that purpose, was sustained in *Smith* v. *Alabama*, (124 U. S. 465.)

An enumeration of the instances in which this court has sustained the validity of local laws intended to promote the safety and comfort of passengers, employes, persons crossing railroads tracks and adjacent property owners, is given in the opinion by Mr. Justice Brown, in *Cleveland &c. Ry. Co.* v. *Illinois*, (177 U. S. 514–16.)

The case of *Chicago, Milwaukee &c. Ry. Co.* v. *Nolan*, (169 U.S. 133,) is, in our opinion, virtually decisive of the question made upon this branch of the case. In that case cattle were loaded at Rock Valley, Iowa, to be shipped to Chicago. The contract, as here, was for interstate transportation. An injury happened to the drover in charge of the cattle in Iowa, due to the negligence of the transporting company. The shipper had signed a contract providing: "That the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount not exceeding the sum of $500.00." The company averred and offered to prove that, in view of this limited liability, it had agreed to transport the cattle at a reduced rate. The statute of Iowa provided: "No contract, receipt, rule or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into. (Iowa Code of 1879, sec. 1308.) The trial court charged that the limitation contained in the contract was void, and a verdict of $1,000.00 damages was returned. A judgment on the verdict was affirmed in the Supreme Court of Iowa. In delivering the opinion of this court, Mr. Justice Gray said:

"A carrier exercising his calling within a particular State, although engaged in business of interstate commerce, is answerable, according to the law of the State for acts of nonfeasance or misfeasance committed within its limits. If he fails to deliver the goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another State, the right of action for the consequent damage is given by the local law. It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the State has the power to redress and punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the State to regulate the relative rights and duties of all persons and corporations within its limits. . . . The statute now in question, so far as it concerns liability for injuries happen-

ing within the State of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty, resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportion of passengers and goods."

It is true that this language was used of a statute of Iowa enacting a rule of obligation for common carriers in that State. But the principle recognized is that in the absence of Congressional legislation upon the subject, a State may require a common carrier, although in the execution of a contract for interstate carriage, to use great care and diligence in the carrying of passengers and transportation of goods, and to be liable for the whole loss resulting from negligence in the discharge of its duties.

We can see no difference in the application of the principle based upon the manner in which the State requires this degree of care and responsibility, whether enacted into a statute or resulting from the rules of law enforced in the State courts. The State has a right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a contract to the contrary notwithstanding. This requirement in the case just cited is held not to be an unlawful attempt to regulate interstate commerce in the absence of Congressional action providing a different measure of liability when contracts, such as the one now before us, are made in relation to interstate carriage. Its pertinence to the case under consideration renders further discussion unnecessary.

The judgment of the Supreme Court of Pennsylvania is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.